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IN THE

Supreme Court of the United States

OCTOBER TERM 1971

No. 71-454

C. J. PAUL DELOME,

Petitioner,

versus

UNION BARGE LINE COMPANY, ET AL,

Respondent.

versus

PLATZER SHIPYARD, INC.,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

WAYNE PATTERSON,
SANDERS & SANDERS
and WALDMAN, SMALLWOOD,
JOHNSON & RAFES
ATTORNEYS FOR PETITIONER
NED JOHNSON, Of Counsel
320 College
Beaumont, Texas 77701

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

The petitioner C. J. Paul Delome respectfully prays that a writ of certiorari issue to review the opinion of the United States Court of Appeals for the Fifth Circuit entered in this proceeding on June 8, 1971.

OPINION BELOW

The opinion of the Court of Appeals, 444 F. 2d 225 (5th Cir., 1971), appears in the Appendix hereto. The Findings of Fact and Conclusions of Law, the Judgment of the United States District Court for the Eastern

District of Texas, Beaumont Division, and the Court of Appeals denial on Petition for Rehearing and Petition for Rehearing En Banc also appear in the appendix hereto. They are not reported.

JURISDICTION

The opinion of the Court of Appeals for the Fifth Circuit which vacated the District Court's judgment and remanded with directions, was entered on June 8, 1971. The petition for rehearing and petition for rehearing en banc was denied on July 19, 1971. The petition for certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked pursuant to Title 28 U.S.C., Sec. 1254 (1).

QUESTIONS PRESENTED

1. Does the humanitarian doctrine requiring the warranty of a seaworthy vessel apply to a ship repairman performing minor repairs as a shipfitter upon a vessel in navigation, notwithstanding the fact that the vessel owner had secured the advantages of specialization in labor and skill by employing ship repairmen to perform minor repairs. Material to this question is the issue of whether or not the modern division of labor and the use of special equipment that was not available to seamen of old are sufficient as a matter of law to overturn the trial judge's fact finding that the ship repairman was performing the "traditional duties of a seaman" in light of this Court's pronouncement in *Seas Shipping Co. v. Sieracki*, 328 U. S. 85, 66 S. Ct. 872, 90 L. Ed. 1099, (1946).

2. Did the Court of Appeals err in reversing, as clearly erroneous. the trial judge's finding of fact that the petitioner was performing the "traditional duties of a seaman" when said fact finding was supported by expert testimony.

3. Did the Court of Appeals err in holding that there is no maritime common law jurisdiction for petitioner's injuries sustained aboard a vessel in navigation resting upon a marine railway drydock when at the time of the injury the vessel was not floating in navigable waters. Material to this question is the issue of whether or not the Extension of Admiralty Jurisdiction Act confers maritime jurisdiction for personal injuries sustained aboard a vessel in navigation, notwithstanding the fact that the vessel was not resting upon navigable waters at the time of injury.

STATUTORY PROVISION

Admiralty Extension Act, Title 46 U. S. C:

Section 740. Extension of Admiralty and Maritime Jurisdictions:

Libel in rem or in personam; exclusive remedy; waiting period:

> "The admiralty and maritime jurisdiction of the United States shall extend to and include all cases of damage or personal injury, to person or property, caused by a vessel on navig-

able water, notwithstanding that such damage or injury be done or consummated on land.

"Any such cases may be brought in rem or in personam according to the principles of law and the rules of practice obtaining in cases where injury or damage has been done and consummated on the navigable waters; * * *" (June 19, 1948c. 526, 62 Stat. 496).

Rule 9 (h) of the Federal Rules of Civil Procedure.

STATEMENT OF THE CASE

The Union Barge Line Company's (herein referred to as the vessel owner), vessel, the UBL 550 was delivered to Platzer Shipyards, Inc., (herein referred to as the ship repairer), shipyard facilities at Green's Bayou, Texas on July 22, 1966, for the purpose of undergoing minor repairs. The vessel, an open hopper barge, remained at the shipyard for seven days, three of which were spent in making repairs costing $3,688.76. These minor repairs were performed so that the barge might return to the commerce and trade in which it had been engaged prior to the delivery of the barge to the shipyard. The vessel remained afloat in navigable waters at the ship repair facilities for two days before being removed to the marine railway drydock for the purpose of effectuating repairs to the forward rake.

Petitioner, a shipfitter, began work on the forward rake at approximately 3:30 P.M. on July 25, 1966. He

performed his duties uneventfully until around 10:30 that same night when it became necessary for him to gain access to the working area inside the forward rake by boarding the vessel and walking down a narrow walkway to a forward manhole cover. Access to the work area inside the forward rake had been gained by the petitioner earlier that day by means of two holes in the forward rake created by the removal of a plate and knuckle. Petitioner was injured while attempting to walk down the narrow twenty inch walkway when he tripped and fell over a hatch coaming less than four inches in height into the empty hatch of the barge some ten feet below. The trial judge found that the vessel owner was negligent in failing to construct a barge with a hatch coaming at least three feet in height, and that said failure also constituted unseaworthiness. The Court further found that the walkway itself was hazardous in that there were various trip hazards that were located in the area in which the plaintiff was walking at the time he fell. The Court held that these unseaworthy conditions existed at a time prior to the delivery of the vessel to the ship repair facilities and that they were not a subject matter of the repair contract or unsafe conditions created by the repairmen themselves. Judgment was entered for $213,437.69.

The trial judge in finding that the petitioner was performing the "traditional duties of a seaman" had before the Court the expert testimony of Captain Vandergrift to the effect that it was the traditional duties of seamen to make various minor repairs to vessels and that some of those repairs constituted replacement of

wooden framework. He went on to say that modern practice makes it cheaper to use the shipyard and that ship repair work had become a specialized industry. Petitioner, as a shipfitter, was replacing metal frames in lieu of wooden framework. There was no particular expertise or training required to perform work, but a winch truck and crane were used to help position the heavy plates in place. Petitioner's duties did not require him to operate the crane or the truck itself. The Court of Appeals upheld the lower court's fact finding that the vessel was in navigation at the time of petitioner's injury, but denied the warranty of seaworthiness in reversing the trial judge's finding that he was performing the traditional duties of a seaman.

The Court of Appeals held that there was no maritime common law jurisdiction and that jurisdiction pursuant to the Extension of Admiralty Jurisdiction Act did not lie in that at the time of petitioner's fall, the vessel itself was on a marine railway drydock and not upon the navigable waters of the United States. The marine railway drydock extended into navigable waters and the stern of the vessel was located approximately 60 feet from the water. The trial court accepted jurisdiction pursuant to Rule 9 (h) of the Federal Rules of Civil Procedure as a maritime cause of action for personal injuries.

REASONS FOR GRANTING THE WRIT

1. **The Court of Appeals' opinion holding that a ship repairman is not entitled to a warranty of a seaworthy vessel when performing minor repairs upon a vessel in navigation because of the use of modern technology and divisions of labor is in direct conflict with this Court's holding in *Seas Shipping Co. v. Sieracki*, supra. A question as to whether or not a ship repairman can be deemed not entitled to the humanitarian doctrine of the warranty of seaworthiness when the vessel has been established in navigation is of national significance in that should the appellate court's decision stand, there would be in effect, no third party maritime actions by ship repairmen against vessel owners based upon the warranty to provide a seaworthy vessel because these ship repairmen utilize to some degree modern day equipment and training that was not available to seamen of old who performed minor repairs to a vessel.**

The present guidelines for determining whether or not a ship repairman is entitled to the warranty of a seaworthy vessel have been derived from *West v. United States*, 361 U.S. 118, 4 L. Ed. 2d 161 (1959). The Court held that the status of the ship; the pattern of the repairs; and the extent of the work contract to be performed are the criteria material to the establishment of the warranty of seaworthiness. The question of whether or not a ship repairman is performing the

traditional duties of a seaman is keyed to the nature of the "repair project as a whole" in lieu of the specific type of work that he is performing at the time of injury. In the case at bar the trial judge found that:

> "The UBL 550 was not being deactivated or retired from commerce and trade during its brief visit to third party defendant's ship repair facilities. There were no structural changes performed on this barge so as to constitute a conversion of the vessel from a barge to another type of vessel. The UBL 550 at all times material to this case was engaged in commerce and trade upon the navigable waters of the United States before entering the third party defendant's ship repair facilities for the purpose of undergoing minor repairs so that it might return to commerce and trade. The cost of repairs and the length of time it took to complete these repairs indicate that the repairs were minor in nature."

The trial judge has in effect found that the "repair project as a whole" was minor in nature considering both the monetary amount and the time spent in effectuating these repairs. Clearly, when reviewing the repair project as a whole, the fact finding by the trial judge that these minor repairs to the vessel were those types of repairs traditionally done by seamen was not "clearly erroneous". *McAllister v. United States,* 348 U.S. 19, 99 L. Ed 20 (1954). Indeed, the Court of Appeals agreed with the trial judge's finding regarding the vessel being in navigation at the time of injury stating:

"Applying these variables in the factual context *sub judice*, it is clear that the UBL 550 was a vessel in navigation undergoing minor repairs at the time of Delome's injury. The barge remained at the shipyards for seven days, in which three were spent in making repairs costing only $3,688.76." The trial judge, in support of his fact finding that petitioner was performing the traditional duties of a seaman, considered the expert testimony of Captain Vandergrift. The Court questioned Captain Vandergrift from the bench regarding the type of repairs that were performed aboard this vessel in relationship to the traditional duties of a seaman and received the following:

> "All right, now, there is some question about whether or not the work that was being done by the plaintiff here was work which is traditionally done by seamen or he was doing work that was in the past at least traditionally done by seamen, was this hull or shell work that which was traditionally done by seamen?"

To which the witness replied:

> "Yes, sir. Back in the old days, in fact, they carried ships carpenters, primarily for the repair of various portions of the ship, they were wooden ships then. But still it is very old and traditional that a seaman is responsible for the upkeep, repair, maneuvering this vessel under the command of the officers."

The Court:

"What about frame repair, would that be the work that was traditionally done by seamen?"

Witness:

"I never heard of tradition, the traditions, I believe, are still accepted under the law, frame work, yes, they had wooden frames. They would replace wooden framework. Modern practice makes it cheaper to take it in the shipyard now."

Captain Vandergrift testified that in the old days it was the traditional duties of seamen to make various repairs to the vessel and went on to say in answer to the following question:

"I see. Then this has become more or less a specialized industry now, is that correct?"

Answer:

"Yes, sir, because now you are using skilled vessels, etc., they require special equipment and although some ships carry welding equipment and other facilities it is not too common. But it is easier to get the work done on shore."

This testimony by a qualified expert witness regarding a fact question to be determined by the trial judge who sits in a position to judge the veracity and integ-

rity of the witness as well as his qualifications, should not be overturned as it has been done in this case by a label of "clearly erroneous".

The appellate court in the case at bar found that the petitioner was not doing the traditional duties of a seaman in that the work that was being performed on the bow of the vessel "required special equipment, including a winch truck and crane not categorized as appurtenant to the vessel." The Court went on to say that the petitioner's crew was engaged in a specialized task demanding training and skills not customarily found among seamen and that the repairs undertaken were not such that could have been performed in the ordinary course of business in the shipping industry. This opinion flies smack in the face of *Sieracki*, supra, and *Jackson v. Lykes Bros. Steamship Co., Inc.*, 386 U. S. 731, 18 L. Ed. 2d 488 (1967). In *Sieracki* the Court was confronted with the issue as to whether or not a longshoreman was protected by the doctrine of a warranty of seaworthy vessel when performing those duties that were formerly done by seamen in loading and unloading vessels. The Court, giving consideration to this warranty, stated:

> "All the considerations which give birth to the liability and have shaped its absolute character dictate that the owner should not be free to nullify it by partialing out his operations to immediary employers whose sole business is to take over portions of the ship's work or by other devices which strip the men performing its services of the historic protection. The risks

> themselves arise from and are incident in fact to the service, not merely to the contract pursuant to which it is done. The brunt of loss cast upon the worker and his dependents is the same, and is as inevitable, whether his pay comes directly from the shipowner or only indirectly through another with whom he arranges to have it done."

The Court went on to say in most positive terms that the fact that the shipowner has secured the advantages of specialization in labor and skills will not negate the traditional responsibility to provide a seaworthy vessel:

> "Historically the work of loading and unloading is the work of the ship's service, performed until recent times by members of the crew. (Omitting cites). That the owner seeks to have it done with the advantages of more modern divisions of labor does not minimize the worker's hazard and should not nullify his protection." * * * "Among these is the obligation of unseaworthiness. It is peculiarly and exclusively the obligation of the owner. It is one he cannot delegate. By the same token it is one he cannot contract away as to any workmen within the scope of its policy. As we have said, he is at *liberty to conduct his business by securing the advantages of specialization of labor and skill brought about by modern divisions of labor. He is not at liberty by doing this to discard his traditional responsibilities. That the law*

> *permits him to substitute others for responsibilities peculiar to the employment relation does not mean that he can thus escape the duty it imposes of more general scope.* To allow this would be, in substantial effect, to convert the ancient liability for maritime tort into a purely contractual responsibility. This we are not free to do." (Emphasis supplied).

The vessel in *Sieracki* was in navigation the same as in the case at bar. Once the navigation question has been determined ship repair and longshore cases are completely analogous as to when the warranty will apply. In *Sieracki* the Court stated that the loading and unloading of the vessel were those duties traditionally done by seamen in the past. They did not look at the specialized equipment that was being used or the fact that the longshore industry had become a modern specialized branch of service to the vessel owner. Certainly, a shipfitter performing minor repairs in the ship's service for the benefit of the vessel owner and his profit is entitled to the same warranty as a longshoreman who unloads and loads the vessel for the vessel owner's benefit. Both use modern equipment of the type that was not available to the seamen who formerly performed this work. The test is not whether or not repairmen or longshoremen now perform the duties that are done by seamen, but whether or not these duties had *formerly* been performed by seamen. The Court stated in *Jackson,* supra:

> "Subsequent decisions in line with the general concept put forth by this Court have read

> Sieracki expansively, and a wide range of maritime employees have been granted the benefit of the seaworthiness doctrine. Carpenters, electricians, ship cleaners, repairmen, and riggers who perform jobs *formerly done by seamen*, have recovered from ship owners on the seaworthiness doctrine." (Omitting cites). (Emphasis added).

The fact that longshoremen often use electric and steam winches, shoreside cranes, automatic conveyor belts, diesel driven forklifts, and various other highly mechanized loading and unloading equipment does not negate the finding of the traditional duties of a seaman, because the Court in *Sieracki* does not permit this distinction. Logic dictates that if it is a prerequisite for a ship repairman or a longshoreman to recover under the warranty of seaworthiness, once it has been established that the vessel was in navigation, that he utilize the same old hand tools and the same old procedures and equipment that were used a hundred years ago, then certainly we have, for all practical purposes, eliminated maritime recovery by these persons that the vessel owners have chosen by contract and delegation to perform duties in the ship's service. Shipfitters of old replaced wooden beams, now they replace metal plates. Manpower hoisted wooden beams in place whereas modern cranes and trucks eliminate that burden today. But the risk remains the same. Both are subject to the same hazards while performing minor repairs in the ship's service. The technical distinction can *not* stand as a bar to recovery.

The appellate court has overturned the judge's fact finding which was supported by expert testimony, and has stated that as a matter of law the modern division of labor and specialized training of ship repairmen will negate a finding of "the traditional duties of a seaman". If this opinion remains the law in the United States Court of Appeals for the Fifth Circuit, then certainly the right to recover under the doctrine of unseaworthiness for ship repairmen in future cases will be non-existent. Chief Judge John Brown has recognized this threat stating in his dissenting opinion in *Johnson v. Oil Transport Co.*, 444 F. 2d 109 (5th Cir. 1971):

> "Recognizing, therefore, that the answer is not easy I nevertheless think this opinion, when considered with other recent ones see e. g. Drake v. Dupont de Nemours & Co, Inc., 5th Cir. 1970, 432 F. 2d 276, 1970 A.M.C., 1951, is driving us to a position which becomes more and more inflexible and effectively waters down protection which the law gives to Sieracki-Ryan-Yacca (Omitting cites) • • • Second, with a Richard Dana " *'Two years before the Mast'* approach *we are measuring the activities of the worker as though the tools and facilities of a Yankee Clipper were the guidelines for the twentieth century.* Today's sailors — free from any real prospect of being shanghied or his health destroyed from an absence of the daily ration of any anti-scorbutics — is everywhere using sophisticated equipment and technics of which radar and electronic-fire-detecting devices, are examples, not to mention

> the exacting activities of crew members of our nuclear submarine fleet or the atomic A/V SAVANNAH. This expands his role beyond the simple task of one who can hand, reef and steer. (omitting footnotes)." (Emphasis added).

The petition for rehearing en banc requested in *Johnson* was denied and Chief Judge Brown dissented from the denial of the en banc hearing stating:

> "For the reasons stated in my dissent to the panel's decision, I dissent to the Court's denial of rehearing en banc. This encompasses both (1) the substantive error and (2) the importance of the problem. On the importance phase, each day offers fresh proof. In a fascinating — and in my judgment an otherwise correct decision, Judge Dyer's opinion for this court in finding no admiralty jurisdiction does it solely on the basis of the nature of the work being done disqualifies the ship repair yard employee as a Sieracki vicarious seaman. Delome v. Union Barge Lines Company, et al, 5th Cir. 1871 (No. 31037, June 8, 1971). On this task I can imagine few repair jobs on modern ships which would qualify. Nearly all will require heavy steel plates, cranes or hoists, welding equipment and, for that matter, the use of floating drydocks and the like.
>
> "Almost as recent is the opinion of Judge Clark voiced in Killer v. Darvo Corp. 5th Cir. 1971 (30255 April 28, 1971). Their decision turns on the withdrawal of the vessel from navigation in

the *West* sense because of the recent sinking of barge made extensive repairs essential. The common hazard in the shipping trade is that of collision with the prospect that the bows will be whole calling for drydocking and extensive repairs which are designed to restore to active trading a vessel which has been withdrawn from so called "navigation" only briefly and then frequently by reason of conditions beyond her control.

"True, the Sieracki-Ryan-Yaka syndrome is the subject of much criticism. But until it is repudiated it ought not to be stranded on such restrictive limitations.

"Except for the traditional longshoreman loading or discharging cargo and repairmen making repairs or adjustments calling only for simple hand tools the warranty of seaworthiness means little in the Fifth Circuit. And what little it means today dwindles tomorrow with each new opinion.

"Whether my substantive view is correct is not too important. *But I think it important that the whole Court should pass on these principles of recurring significance. Failing to do that, I can only hope others will do so.*" (Emphasis supplied).

Judge Brown is apparently requesting this Honorable Court to make whole the warranties provided by

Sieracki, or to repudiate *Sieracki* completely. The recent line of cases in the Fifth Circuit has effectively eliminated third party ship repair cases even where the trial judge finds that the man is performing the traditional duties of a seaman. Certainly this law is contrary to *Sieracki* and should be nullified and aborted. A petition for writ of certiorari is currently pending in *Johnson*, with the issue regarding the *Sieracki* warranties to a shiprepairman being identical to the case at bar. Petitioner's counsel in both cases would not oppose a consolidation for oral argument.

2. A maritime jurisdictional question of national significance is whether or not a ship repairman, such as the petitioner, can recover under the maritime law for injuries sustained aboard a vessel in navigation when said vessel is not resting upon the navigable waters of the United States. This issue has two facets in that this Court is being called upon to adopt the maritime status or connection test in determining federal maritime jurisdiction in lieu of the strict locality test, and to determine whether or not the Extension of Admiralty Jurisdiction Act can be construed to include injuries caused by a vessel in navigation.

The Court of Appeals held that there was no maritime jurisdiction over petitioner's negligence claim against the vessel owner in that the injury occurred upon the vessel while on a marine railway drydock and that the Extension of Admiralty Jurisdiction Act did not confer jurisdiction in that the injury was not

"caused by a vessel upon navigable waters". Certainty and uniformity in the application of law is vital to the public in the prosecution of their personal injury claims. Justice Harlan has said in *Moragne v. States Marine Lines, Inc.*, 398 U.S. 375, 403-04 (1970) that:

> "The confidence of people in their ability to predict the legal consequences of their actions is vitally necessary to facilitate the planning of primary activity and to encourage the settlement of disputes without respect to the courts. However, that confidence is threatened least by the announcement of a new remedial rule to effectuate well-established primary rules of behavior. There is no question in this case of any change in the duties owed by shipowners to those who work aboard their vessels. Shipowners well understand that breach of the duty to provide a seaworthy ship may subject them to liability for injury regardless of where it occurs, and for death occurring on the high seas or in the territorial waters of the States. It can hardly be said that shipowners have molded their conduct around the possibility that in a few special circumstances they may escape liability for such a breach. Rather, the established expectations of both those who own ships and those who work on them are that there is a duty to make the ship seaworthy and that a breach of that federally imposed duty will generally provide a basis for recovery. It is the exceptional denial of recovery that disturbs these expectations."

The appellate court, in the case at bar, accepted jurisdiction over the unseaworthiness claim but denied recovery, in holding that petitioner was not performing the traditional duties of a seaman. In the same breath the Court held that there was no maritime jurisdiction over the negligence cause of action, and that petitioner could have filed a diversity of citizenship case against the vessel owner, alleging failure to provide a reasonably safe place in which to work. This is inconceivable. First it would require an injured ship repairman to file a Rule 9h case for unseaworthiness applying maritime principals of comparative negligence. Assumption of the risk would not be a defense, and there would be no right to a jury trial by either party. Then the repairman, in order to protect himself, should the Court find that he is not a *Sieracki* seaman, would be required to file a diversity action on the civil side of the docket if the opinion of this appellate court is upheld, where there would be a jury trial with none of the maritime principles of law applying. It would be simply a "Erie court" applying state law. The two causes of action could not be consolidated because of the conflicting concepts between state and maritime law, not to mention the irreconcilability of jury as opposed to nonjury trials. This bizarre result for ship repairmen has been brought about by the appellate court's refusal to accept the maritime status or contract doctrine for maritime jurisdiction in lieu of the restrictive locality or situs of the injury test.

It is inconceivable that once the vessel has been established to be in navigation, that a ship repairman can be denied maritime jurisdiction over his negligence claim, because the vessel is resting on a marine

railway drydock, where the same ship repairman the very same day, could be working on the very same vessel in a floating drydock, performing the same duties and be entitled to maritime jurisdiction simply because there is water underneath the vessel. The hazards and the risks are identical in both instances. In the case at bar petitioner was subjected to the exact same unsafe place to work, unseaworthy conditions, and defective design regardless of whether or not the vessel was in the water at the time of the injury. It is the maritime contacts in relation to the services rendered to the vessel owner that confer maritime jurisdiction. Can it be said that a *Sieracki* seaman is entitled to the warranty of a seaworthy vessel, but not to a negligence claim based upon a failure to provide a reasonably safe place to work? Certainly there is no logic to such an incompatible result such as this appellate court has reached in the case at bar. Judge Learned Hand in *Strika v. Netherlands,* 185 F. 2d 555 (2d. Cir. 1950), in reviewing the right of a longshoreman to proceed on a negligence claim against the vessel owner for injuries sustained while on land, held that:

> "From this the defendant argues that since an action upon such an implied warranty is only a tort, the maritime law can have no jurisdiction over a breach of it occurring upon land; that being, of course, an accepted constitutional limitation upon maritime law. We should have found this a serious obstacle, were it not for O'Donald v. Great Lakes Dredge and Dock Company, supra, footnote 14, and the *ratio decindendi* of Swanson B. Marra Bros., Inc., su-

pra; but those decisions appear to us to settle it that such a tort, arising as it does out of a maritime 'Status' or 'relation', is cognizable by the maritime law whether it arises on sea or on land. For it seems to us to follow, if Congress has power to impose liabilities in favor of seaman for lapses of cure on shore, that Congress at least would have power to impose a similar liability when the lapse is in furnishing a seaworthy ship. It is true that Congress has not intervened as to seaworthiness; but there is no more reason to circumscribe more narrowly the duty, which the Osceola, supra, established as part of the maritime law, than the Constitution circumscribes the power of Congress, for both in the end are based upon the same provision. Moreover, we find confirmation for this in the "obligation" of "maintenance and cure" of a seaman injured on shore, for that is concededly quite and entirely the creature of the maritime law as the "obligation" to furnish a seaworthy ship. For these reasons, although we have been unable to find a decision holding that a seaman, injured ashore by unseaworthy ship's gear, can recover, we have no doubt that he could; and, if a seaman can, we see no reason to question the ability of a longshoreman also to recover, for that follows from the reasoning of Sea Shipping Company v. Sieracki, supra, especially when it is read with the opinion in Swanson v. Marra Bros. Inc., supra, Public Law 695 of June 19, 1948, 46 USCA Sec. 740 has now probably laid all such doubts, *but we think that it was*

> *not necessary in order to support a recovery in this particular situation.*" (Emphasis added) (omitting footnotes).

Judge Hand has clearly laid to rest the requirement that the situs of the tort be upon the navigable waters in that this decision did not rely upon the provisions of the Extension of Admiralty Jurisdiction Act. Most recently in *Gebhard v. SS HAWAIIAN LEGISLATOR*, 425 F. 2d 1303 (9th Cir. 1970), the Court had before it the question of whether or not maritime jurisdiction applied to a longshoreman who was injured on the dock by shorebased equipment. Judge Huffstedler presented a thorough comprehensive study of the history of maritime jurisdiction in relationship to longshoremen's claims and the Extension of Admiralty Jurisdiction Act of 1948. Judge Huffstedler, quoting Judge Hand extensively from *Strika*, supra, went on to state:

> "When a petitioner has successfully pleaded the elements of unseaworthiness claim, as has Gebhard, it is unnecessary to decide whether the injury was 'caused by the vessel' within the meaning of Section 740. * * * A longshoreman's duties bring him into a zone of danger unique to maritime commerce (see note, 'Risk Distribution and Seaworthiness', 1966), (75 Yale L. J. 1174, 186-87), and his injury, when incurred in the ship's service by ship's equipment, is an appropriate subject of maritime jurisdiction. Application of a uniform federal law gives both domestic and foreign participants in the shipping industry the ability to know in advance the rights AND liabilities

> and gives to the injured longshoremen broad venue and the maritime lien, important devices when dealing with farflung shipping interest."

Gutierrez v. Waterman Steamship Corp., 373 U.S. 206, 10 L. Ed 2d 297, 83 S. Ct. 1185 reh. den. 374 U. S. 858 (1963) applied the Extension of Admiralty Jurisdiction Act to injuries sustained by a longshoreman when he slipped on some beans which has spilled from a defective cargo container that had been removed from a vessel in the navigable waters. The fact that Congress has chosen to abandon the situs of the tort as a controlling prerequisite for maritime jurisdiction is important in determinin how strict an interpretation should be placed upon the requirement that the injury be caused by "a vessel on navigable waters". In *Gutierrez* the injury occurred upon a dock and not upon the vessel as in the case at bar. The defective cargo container and its beans had been removed from the vessel and were not under the control of the vessel owner at the time of the longshoreman's injury. There was only the weakest connection in *Gutierrez* between a vessel on navigable waters and the ultimate injury that was consummated on land. In petitioner's case, the unseaworthiness and negligent conditions arose prior to the vessel being placed upon the marine railway drydock. The tort itself was committed when the vessel owner designed the narrow walkway with the raised pumpwell covers, brackets and other trip hazards, including its failure to provide a hatch coaming that would prevent seamen, *Sieracki* or otherwise, from falling into the open hatch while walking down the narrow aisle. The actionable tortus condition ex-

isted while this barge was in navigation upon the navigable waters and at all times up until and including the time when the damage was consummated on the marine railway drydock. *Gutierrez* requires as a prerequisite for maritime jurisdiction that the ship owner commit a tort while or *before* the ship was being unloaded, the impact of which was felt ashore at a time and place not remote from the wrongful act. Petitioner contends that the unsafe construction of the walking area and hatch coaming was a continuing unseaworthy and negligent condition existing during the entire time the vessel plied the open seas up until and including the time it was placed upon the marine railway drydock. The inevitable damages were consummated upon the vessel at a later time, not remote from the period of time immediately prior to the delivery of the barge to the ship repairer's facilities. It can easily be seen that the appellate court erred in holding no maritime jurisdiction under the Extension of Admiralty Jurisdiction Act in view of the trial judge's findings that the unsafe place to work existed prior to the delivery of the vessel to the ship repair facilities, bearing in mind that said vessel was floating in the navigable waters of the United States two days prior to being placed upon the marine railway drydock. Justice White in *Gutierrez,*:

> *"But we may put this aside, since control of the impact zone is not essential for negligence. The man who drops a barrel out of his loft need not have control of the sidewalk to be liable to the pedestrian whom the barrel hits."* (Emphasis added)

Certainly the negligence of the defendant in the design of the walkway and hatch coaming occurred and existed while the vessel was upon navigable waters and it was not necessary that the vessel owner control the impact zone, that is, the final resting place where the damages were inevitably finalized. The rationale of *Sieracki* in extending the warranty of seaworthiness to ship repairmen is based upon the simple thought that when a man performs work in the ship's service for the benefit of the vessel owner he is entitled to a reasonably safe place in which to work when he experiences the same hazards as a blue water seamen upon the open sea or a quite inland canal. The petitioner was exposed to the same unsafe and unseaworthy conditions while the vessel in question was on the marine railway drydock as he would have been had the vessel been floating in the slip some sixty feet away at the time of his injury. The case at bar is actually stronger than *Gutierrez* since the situs of the injury was actually consummated upon the vessel itself, said vessel having been deemed in navigation. While it is not an issue before this Court, it is interesting to note that coverage for ship repairmen under the Federal Longshoremen and Harbor Workers' Compensation includes those persons sustaining injuries upon marine railway drydocks the same as if they were floating drydocks. *Avondale Marine Ways v. Henderson*, 201 F. 2d 437 (5th Cir., 1953); *Maryland Casualty Co. v. Lawson*, 101 F. 2d 732 (5th Cir., 1939).

To enable uniform recovery and certainty of remedies for ship repairmen performing work upon a vessel, which has been deemed "in navigation" upon a marine railway drydock, it is necessary and imperative that

this term, as defined in an unseaworthiness claim, be analogous and compatible with a finding a "upon navigable water" to embrace maritime jurisdiction pursuant to the Extension of Admiralty Jurisdiction Act.

CONCLUSION

The United States Court of Appeals for the Fifth Circuit has diluted the *Sieracki* warranty of a seaworthy vessel to the point where it has become a meaningless doctrine for the protection of those persons exposed to the hazards of working aboard vessels in the ship's service. If the decision in the case at bar stands, then there can be no third party ship repair cases against the vessel owner for the breach of the warranty to provide a seaworthy vessel when the vessel is in navigation, because the appellate court has ruled as a matter of law that the modern divisions of labor and specializations of skills will prevent a finding that a ship repairman was "performing the traditional duties" of a seaman at the time of his injury. In the case at bar, the trial judge's fact finding was based upon expert testimony by a sea captain that the petitioner was performing those duties traditionally performed by seamen and the Court of Appeals has taken it upon itself to hold as a matter of law that such finding was "clearly erroneous." This conclusion by the appellate court is in direct diametrical conflict with the warranty provided by *Sieracki* and *Jackson* which expressly rules out the use of modern divisions of labor, specialized skills and equipment as a means for the vessel owner to end-run *Sieracki* and the humanitarian doctrine of seaworthiness.

This Honorable Court should further grant certiorari to hear the question of national significance regarding maritime jurisdiction. Ship repairmen in numerous coastal states are now uncertain as to whether or not they have a maritime cause of action when injured on a marine railway drydock, even though the vessel may be found to be in navigation at the time of injury. The appellate court's decision that there can be jurisdiction over an unseaworthiness claim and not over a negligence claim arising out of the same injury will create bizarre results which will lead to confusion and uncertainty in the prosecution of personal injury claims for ship repairmen. Therefore, this Court should issue a Writ of Certiorari and exercise its general powers of supervision over admiralty law to eliminate this uncertainty as to the boundaries of maritime law and to reinstate the warranties provided by *Sieracki* which for all practical purposes have been removed by the appellate court's decision.

Respectfully submitted,

WAYNE PATTERSON,
SANDERS, & SANDERS and
WALDMAN, SMALLWOOD,
JOHNSON & RAFES

NED JOHNSON
Counsel for Petitioner
320 College
Beaumont, Texas 77701

PROOF OF SERVICE

I hereby certify that a copy of the foregoing has been furnished the attorneys for the Respondents herein this 22 day of September, 1971.

_____

Attorney for Petitioner

APPENDIX A

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 31037

C. J. PAUL DELCME,
Plaintiff-Appellee,
versus

UNION BARGE LINE COMPANY, ET AL.,
Defendants-Third Party
Plaintiffs-
Appellants-Cross Appellees,

versus

PLATZER SHIPYARD, INC.,
Third Party Defendant-
Appellee-
Cross Appellant.

Appeal from the United States District Court for the
Eastern District of Texas

(June 8, 1971)

Before O'SULLIVAN,* THORNBERRY and DYER, Circuit Judges.

DYER, Circuit Judge: Union Barge Line Company and Platzer Shipyard, Inc., appeal from the District Court's judgment for Delome, a shipfitter injured on the Barge UBL 550 while it rested on a marine railway. Appellants contend that the trial court had no admiralty and maritime jurisdiction over this controversy, that the court's conclusions concerning the unseaworthiness of the barge and the negligence of Union were erroneous, and that the damages assessed were excessive. We vacate with directions.

An open-hopper cargo barge, the UBL 550 had no motive power and carried no crew. On its port and starboard decks were walkways twenty inches wide. Coamings 3 5/16 inches high separated these walkways from the open cargo hatch. On the port side of the vessel, brackets extended into the walkway from the hatch coaming. Bitts (commonly known as timberheads) approximately nine inches high, as well as a circular pumpwell cover, were located in the same walkway.

On July 22, 1966, the UBL 550 was delivered to Platzer's repair facility in Green's Bayou, Texas, for repairs to its forward rake area. Two days later the barge was placed on a marine railway and moved out of the water so that workmen could take a damaged plate from the forward rake and reseal the opening. During the evening shift on July 25, a foreman ordered

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*Senior Circuit Judge, 6th Circuit, sitting by designation.

Delome, one of the workers, to go onto the barge and enter the forward rake space through a hatchway. To facilitate ingress and egress, Platzer had placed a ladder twenty feet from the forward bulkhead on the port side. Employees such as Delome used this ladder to climb aboard.

Following his instructions, Delome reached the port walkway. As he started forward, he was temporarily blinded by the glare of a 1000-watt onshore light located on a pole near the vessel's bow. After taking a few steps in this dazzled condition, Delome fell ten feet into the open cargo hold.

Delome collected under the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C.A. §§ 901-950, then initiated this action against Union Barge Line Co. pursuant to Rule 9(h) of the Federal Rules of Civil Procedure.[1] Subsequently Union impleaded Platzer — the third-party complaint alleging that Platzer's negligence and breach of its duty of workmanlike performance proximately caused Delome's injury. According to the record, no party objected to the District Court's assumption of admiralty jurisdiction.

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[1]Rule 9 provides in pertinent part:

> (h) Admiralty and Martime Claims. A pleading or count setting forth a claim for relief within the admiralty and maritime jurisdiction that is also within the jurisdiction of the district court on some other ground may contain a statement identifying the claim as an admiralty or maritime claim for the purposes of Rules 14(c), 38(e), 82, and the Supplemental Rules for Certain Admiralty and Maritime Claims. If the claim is cognizable only in admiralty, it is an admiralty or maritime claim for these purposes whether so identified or not. . . ."

Sitting without a jury, the District Judge heard the evidence and concluded that, at the time of Delome's accident, the UBL 550 was a vessel in navigation; that Union owed a warranty of seaworthiness to Delome because he "was performing the traditional duties of a seaman in making minor repairs as a shipfitter;" and that Union had breached this warranty by providing an unseaworthy walkway, filled with trip hazards which circumscribed a hatch coaming insufficient in height. The court held that these breaches were causally related to Delome's fall. Furthermore, the court decided that Union was negligent in furnishing Delome with an unsafe place to work; it held that such negligence was a proximate cause of Delome's injuries. The court also determined that Platzer was negligent in failing to install a guard rail around the hopper cargo area and in positioning its onshore light. Concluding that Platzer's negligence proximately caused Delome's injuries and constituted a breach of the duty of workmanlike performance owed to Union, the District Court held that Platzer was obligated to indemnify Union for all sums recovered by Delome as a result of the accident. Finally, the court found Delome 5% contributorily negligent and diminished his recovery by that percentage. It awarded damages of $213,437.69 together with interest at 6% per annum.

Both Union and Platzer have appealed. They question the District Court's assumption of admiralty jurisdiction and attack the court's conclusions with respect to the warranty of seaworthiness and duty to provide a safe place to work. They also assert that the damages assessed by the court were excessive.

ADMIRALTY JURISDICTION

A. *The Navigable Waters Test*

When Delome fell, the UBL 550 was located on a marine railway. Its stern was approximately sixty-five feet inland. In fact, no part of the barge was on, or even over, navigable water. Consequently the Admiralty Etension Act[2] is inapplicable.

Postulating that breach of the warranty of seaworthiness is a maritime tort, Union and Platzer argue that Delome's "unseaworthiness" claim was not within the District Court's "admiralty and maritime jurisdiction" as articulated by the Constitution,[3] and defined by Congress[4] and the federal courts.[5] The vessel, the

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[2] 46 U.S.C.A. § 740. The Extension Act provides in pertinent part:

> The admiralty and maritime jurisdiction of the United States shall extend to and include all cases of damage or injury, to person or property, caused by a vessel on navigable water, notwithstanding that such damage or injury be done or consummated on land.
>
> In any such case suit may be brought in rem or in personam according to the principles of law and the rules of practice obtaining in cases where the injury or damage has been done and consummated on navigable water . . . .

[3] U.S. Const. art. III, § 2.

[4] *E.g.*, Jones Act, 46 U.S.C.A. § 688; Admiralty Extension Act, 46 U.S.C.A. § 740. Ostensibly there are limits to the congressional power. *See, e.g., O'Donnell v. Great Lakes Dredge & Dock Co.*, 1943, 318 U.S. 36, 42-43; *The Blackheath*, 1904, 195 U.S. 361, 368-69 (Brown, J., concurring); *The Lottawanna*, 1874, 88 U.S. (21 Wall.) 558, 577; *The Belfast*, 1868 74 U.S. (7 Wall.) 624, 640-41; *Gebhard v. S.S. Hawaiian Legislator*, 9 Cir., 1970, 425 F.2d 1303, 1316 (Wright J., dissenting in part). *See* also Black, "Admiralty Jurisdiction: Critique and Suggestions," 50 *Colum. L. Rev.* 259 (1950); Maraist, "Proposed Discipline or a Proce-

accident, and the injury were too remote from the water's edge, the traditional boundary of admiralty tort jurisdiction. Thus framed, the issue is simple, if somewhat wordy: whether the shoreward sweep of the silver oar encompasses a shipyard worker's suit against a vessel owner when the complaint alleges that the worker is a *Sieracki*[6] seaman injured because of the vessel's unseaworthiness, if the vessel is located on a marine railway outside navigable water.

Born of dicta[7] and nurtured by fiction,[8] the shipowner's warranty of seaworthiness in personal injury cases is now firmly rooted in federal maritime law.[9]

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dural Problem Child: Reallocation of Admiralty Tort and Compensation Jurisdiction Between Federal and State Courts," 24 *U. Miami L. Rev.* 26 (1969); Morrison, 'The Remedial Powers of the Admiralty," 43 *Yale L.J.* 1 (1933); Tetreault, "Seamen, Seaworthiness, and the Rights of Harbor Workers," 39 *Cornell L.Q.*, 381 (1954).

[5]Judicial applications of the rules delineated by *The Plymouth*, 1865, 70 U.S. (3 Wall.) 20, 35-36, *The Osceola*, 1903, 189 U.S. 158, 171, 175, and their progeny have evoked perceptive critical comment in a number of publications. *E.g.*, Tetreault, "Seamen, Seaworthines, and the Rights of Harbor Workers," 39 *Cornell L.Q.* 381 (1954); Note, "Risk Distribution and Seaworthiness," 75 *Yale* L.J. 1174 (1966); Comment, 'Seamen and the Warranty of Seaworthiness in Maritime Injuries — Sieracki Today," 34 *Tulane L.Rev.* 572 (1960); Comment, "A New Look at the Unseaworthiness Doctrine: The *Roper* Case," 29 *U.Chi. L. Rev.* 519 (1962).

[6]*Seas Shipping Co. v. Sieracki*, 1946, 328 U.S. 85.

[7]*The Osceola*, 1903, 189 U.S. 158, 175; *see United New York & New Jersey Sandy Hook Pilots Association v. Halecki*, 1959, 358 U.S. 613, 616.

[8]*Latus v. United States*, 2 Cir. 1960, 277 F.2d 264, 267, *cert. denied*, 364 U.S. 827. *See also* Tetreault. 'Seamen, Seaworthiness, and the Rights of Harbor Workers," 39 *Cornell L.Q.* 381 (1954).

[9]*See generally* Bue, "Admiralty Law in the Fifth Circuit — A Compendium for Practitioners: I," 4 *Hous. L.Rev.* 350, 392-408 (1966) (pre-1966 judicial development).

For years this warranty was considered contractual in nature. *E.g., The Osceola*, 1903, 189 U.S. 158, 171-75; *Hamilton v. United States*, 4 Cir. 1920, 268 Fed. 15, 21, *cert. denied*, 254 U.S. 645; *Rainey v. New York & P. S.S. Co.*, 9 Cir 1914, 216 Fed. 449, 453, *cert. denied*, 235 U.S. 704; *see Seas Shipping Co. v. Sieracki*, 1946, 328 U.S. 85, 90. Recently, however, some courts have articulated the thesis that breach of the warranty is tortious. *E.g., Gebhard v. S.S. Hawaiian Legislator*, 9 Cir. 1970, 425 F.2d 1303, 1310; *Strika v. Netherlands Ministry of Traffic*, 2 Cir. 1950, 185 F.2d 555, 558, *cert. denied*, 1951, 341 U.S. 904; *The Chiswick*, 5 Cir. 1916, 231 Fed. 452, *cert. denied*, 241 U.S. 673; *see Gutierrez v. Waterman Steamship Corp.*, 1963, 373 U.S. 206, 214-15. Nevertheless, given their factual contexts, the latter expressions must be regarded as dicta: in each case the vessel was moored on navigable waters and the causes were, at least, within the purview of the Extension Act. *See, e.g., Strika v. Netherlands Ministry of Traffic, supra* at 556. Indeed, we have found no case in which a definition of the intrinsic nature of the warranty of seaworthiness was necessary for determination of a federal court's admiralty jurisdiction.

The warranty of seaworthiness in personal injury cases essentially depends on neither common-law tort nor contract concepts. *Dimas v. Lehigh Valley R.R.*, 2 Cir. 1956, 234 F.2d 151, 153. Instead, while the seaworthiness doctrine is comprised of both tort and contract elements, it is a creature of twentieth-century judicial policy concerning risk distribution in the shipping industry. In *Seas Shipping Co. v. Sieracki*,

supra, the Supreme Court explicated this basis for the doctrine. It stated:

> Obviously the norm of the liability has been historically and still is the case of the seaman under contract with the vessel's owner. This is because the work of maritime service has been done largely by such persons . . . .
>
> Because rationalizing the liability as one attached by law to the relation of shipowner and seaman, where this results from contract, may have been thought useful to negative the importation of those common-law tort limitations does not mean, however, that the liability is itself contractual or that it may not extend to situations where the ship's work is done by others not in such an immediate relation of employment to the owner. That the liability may not be either so founded or so limited would seem indicated by the stress the cases uniformly place on its relation, both in character and in scope, to the hazards of marine service which unseaworthiness places on the men who perform it. . . . Those risks are avoidable by the owner to the extent that they may result from negligence. And beyond this he is in position, as the worker is not, to distribute the loss in the shipping community which receives the service and should bear its cost.
>
> These and other considerations arising from the hazards which maritime service places upon the men who perform it, rather than any

> consensual basis of responsibility, have been the paramount influences dictating the shipowner's liability for unseaworthiness as well as its absolute character. It is essentially a species of liability without fault, analogous to other well known instances in our law. Derived from and shaped to meet the hazards which performing the service imposes, the liability is neither limited by conceptions of negligence nor contractual in character... it is a form of absolute duty owing to all within the range of its humanitarian policy.

328 U.S. at 90-95 (footnotes omitted) (citations omitted). This warranty does not apply solely to vessels plying their trade on the high seas; it does not necessarily terminate, or become suspended, when ships reach calm waters or safe harbors. The warranty contemplates not only the turbulence of the oceans but also the conditions peculiar to ships, where space and equipment must be utilized carefully to minimize accident-inducing hazards. While the vessel owner's warranty does not mean that he has eradicated all risks or that his ship can weather all storms, it does indicate that the vessel is reasonably fit for the intended use. *See Boudoin v. Lykes Brothers Steamship Co.*, 1955, 348 U.S. 336, 339. It is both absolute and nondelegable. *United New York & New Jersey Sandy Hook Pilots Association v. Halecki*, 1959, 358 U.S. 613, 616-17; *see Carlisle Packing Co. v. Sandanger*, 1922, 259 U.S. 255, 259. Recently the Court added:

> A major burden of the Court's decisions spelling out the nature and scope of the cause

> of action for unseaworthiness has been insistence upon the point that it is a remedy separate from, independent of, and additional to other claims against the shipowner, whether created by statute or under general maritime law. More specifically, the Court has repeatedly taken pains to point out that liability based on unseaworthiness is wholly distinct from liability based upon negligence. The reason, of course, is that unseaworthiness is a *condition*, and how that condition came into being — whether by negligence or otherwise — is quite irrelevant to the owner's liability for personal injuries resulting from it.

Usner v. Luckenback Overseas Corp., 1971, 400 U.S. 494, 498; *see Aguirre v. Citizens Casualty Co.*, 5 Cir. 1971, ___ F.2d ___, ___ [No. 30364, Mar. 26, 1971].

To hold, then, that this uniquely maritime cause of action is circumscribed by the same admiralty jurisdictional boundaries as common-law "land" torts would contravene the risk distribution policy underlying the doctrine as well as common sense. *Cf. O'Donnell v. Great Lakes Dredge & Dock Co.*, 1943, 318 U.S. 36, 42-43. In reason and in practice, federal jurisdiction to consider alleged breaches of the shipowner's warranty to furnish a seaworthy vessel cannot depend on such gossamer classification. In another context Mr. Justice Harlan has said:

> The confidence of people in their ability to predict the legal consequences of their actions is vitally necessary to facilitate the planning of

primary activity and to encourage the settlement of disputes without resort to the courts. However, that confidence is threatened least by the announcement of a new remedial rule to effectuate well-established primary rules of behavior. There is no question in this case of any change in the duties owed by shipowners to those who work aboard their vessels. Shipowners well understand that breach of the duty to provide a seaworthy ship may subject them to liability for injury regardless of where it occurs, and for death occurring on the high seas or in the territorial waters of most States. It can hardly be said that shipowners have molded their conduct around the possibility that in a few special circumstances they may escape liability for such a breach. Rather, the established expectations of both those who own ships and those who work on them are that there is a duty to make the ship seaworthy and that a breach of that federally imposed duty will generally provide a basis for recovery. It is the exceptional denial of recovery that disturbs these expectations.

Moragne v. States Marine Lines, Inc., 1970, 398 U.S. 375, 403-04. Justice Harlan's scholarly opinion articulates our thoughts here. That a vessel is drydocked does not necessarily mean that no warranty of seaworthiness is owed. *See, e.g., Johnson v. Oil Transport Co.*, 5 Cir. 1971, ____ F.2d ____, ____[No. 28418, Mar. 12, 1971]; *Moye v. Sioux City & New Orleans Barge Lines, Inc.*, 5 Cir. 1968, 402 F. 2d 238, *cert. denied*, 1969, 395 U.S. 913; *Rogers v. M/V Ralph Bollinger*,

E.D. La. 1968, 279 F. Supp. 92, 95; *Allen v. Union Barge Line Corp.*, E.D. La. 1965, 239 F. Supp. 1004, 1008, *aff'd*, 5 Cir. 1966, 361 F.2d 217, *cert. denied*, 1967, 385 U.S. 1006. Nor does the fact that the ship is temporarily out of the water necessarily defeat federal jurisdiction with regard to causes involving possible breaches of the warranty's existence and federal jurisdiction to the claimed warranty. Instead, as the cases illustrate, consider alleged breaches depend on conceptual considerations, such as status, discussed *infra*. The "in navigable waters" spatial limitation is not determinative. It follows that any jurisdictional dichotomy between marine railways and other types of drydocks[10] regarding the warranty of seaworthiness would be a fictional artifice, contrived to ensure conformity to a spatial boundary which is not really pertinent. To abjure federal jurisdiction over this maritime doctrine on the basis of the navigable waters criterion would exemplify "the exceptional denial of recovery that dis-

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[10]For purposes of the Longshoremen's and Harbor Workers' Compensation Act, marine railways have been identified as drydocks. *Holland v. Harrison Brothers Dry Dock & Repair Yard, Inc.* 5 Cir. 1962, 306 F.2d 369, 372-73; *Avondale Marine Ways, Inc. v. Henderson*, 5 Cir. 1953, 201 F.2d 437, 438, *aff'd*, 346 U.S. 366; *Continental Casualty Co. v. Lawson*, 5 Cir. 1933, 64 F.2d 802, 804-05. That the test is functional — coverage under the Act being dependent on the type of work for which the facility was intended — is manifested by the fact that accidents on other types of docks have been considered outside the Act's scope. *See Nacireme Operating Co. v. Johnson*, 1969, 396 U.S. 212, 217 n. 10, 222-23; *Travelers Insurance Co. v. Shea*, 5 Cir. 1967, 382 F.2d 344, 346-47, *cert. denied*, 389 U.S. 1050; *O'Leary v. Puget Sound Bridge & Dry Dock Co.*, 9 Cir. 1965, 349 F.2d 571; *American Mutual Liability Insurance Co. v. Neumann*, S.D. Ala. 1969, 1970 AMC 466. *But See* Note, 'Dockside Injuries Under the Longshoremen's and Harbor Workers' Compensation Act," 3 *Ga. L.Rev.* 622 (1969).

turbs" the established expectations of both those who own ships and those who work on them. It can hardly be said that shipowners have molded their conduct around the possibility that by placing their vessels on marine railways rather than in some other type of drydock, they may escape liability for breaches of the warranty of seaworthiness. The distinction would be as difficult to sustain rationally as that found wanting in *Moragne*. Consequently we hold that the navigable waters, or locality, test is inapplicable to an unseaworthiness claim demanding damages as a result of personal injuries occurring aboard a vessel on a marine railway.

B. *The "Status" Touchstone*

To determine whether a warranty of seaworthiness is owed shoreside workers, examination of three status-oriented factors becomes essential. We focus on "the status of the ship, the pattern of the repairs, and the extensive nature of the work contracted to be done, rather than the specific type of work that each of the numerous shore-based workmen is doing on shipboard at the moment of injury." *West v. United States*, 1959, 361 U.S. 118, 122; *accord, Watz v. Zapata Off-Shore Co.*, 5 Cir. 1970, 431 F.2d 100, 108; *Moye v. Sioux City & New Orleans Barge Lines, Inc., supra* at 240.

Concerning the status of the ship, clearly even a drydocked vessel may be subject to the warranty of seaworthiness if it is in navigation — *i.e.*, "engaged as an instrument of commerce and transportation on navigable waters." *Rogers v. M/V Ralph Bollinger, supra* at 94-95; *see Hilton v. Aegean Steamship Co.*, D. Ore.

1965, 239 F. Supp. 268. After an extensive discussion of this subject, this Court concluded t. at a precise definition of the phrase "in navigation" is impossible. *Johnson v. Oil Transport Co., supra* at ——. Indeed, the navigational status of the vessel ordinarily remains a question of fact. *Roper v. United States,* 1961, 368 U.S. 20, 22-23. Nevertheless, a vessel which temporarily leaves commerce, enters a shipyard for minor repairs, and thereupon returns to commerce remains in navigation for purposes of the warranty. *See Drake v. E. I. DuPont deNemours & Co.*, 5 Cir. 1970, 432 F.2d 276, 277-78; *Martin v. Jones,* E.D. La. 1968, 296 F. Supp. 878, 881; *Rogers v. M/V Ralph Bollinger, supra; Allen v. Union Barge Line Corp., supra* at 1007; *Hilton v. Aegean Steamship Co., supra.*

Concerning the pattern of repairs, the limiting factor is tradition: it "requires that the injured shore-based worker be engaged in work traditionally that of a seaman, ... excluding those persons performing such tasks as making major repairs requiring dry-docking or special skills." *Atkins v. Greenville Shipbuilding Corp.*, 5 Cir. 1969, 411 F.2d 279, 282, *cert. denied*, 396 U.S. 846; *see Drake v. E. I. DuPont deNemours & Co., supra* at 278. Moreover, "[t]he inquiry is not who best can bear the risk, but whether the repair *project* — not the specific task — is one that 'seamen' historically have performed." *Watz v. Zapata Off-Shore Co., supra* at 107.

Concerning the extensive nature of the work contracted to be done, little need be said; for this criterion is intertwined with the "in navigation" requirement discussed previously. Generally "dead" ships, those

withdrawn from navigation and undergoing major repairs, are not subject to the warranty of seaworthiness. *West v. United States, supra* at 122; *Johnson v. Oil Transport Co., supra* at ____; *Baum v. United States,* 5 Cir. 1970, 427 F.2d 215, 217; *Stark v. United States,* 5 Cir. 1969, 413 F.2d 253; *Van Horn v. Gulf Atlantic Towing Corp.,* 4 Cir. 1968, 388 F.2d 636, 638; *Latus v. United States,* 2 Cir. 1960, 277 F.2d 264, 266, *cert. denied,* 364 U.S. 827; *Union Carbide Corp. v. Goett,* 4 Cir. 1958, 256 F.2d 449, 455, *rev'd on other grounds,* 1959, 361 U.S. 340; *Guenard v. United States,* E.D. La. 1968, 278 F.2d 310. Conversely, as noted earlier, vessels undergoing minor repairs remain subject to the warranty.

Applying these variables in the factual context *sub judice,* it is clear that the UBL 550 was a vessel in navigation undergoing minor repairs at the time of Delome's injury. The barge remained at the shipyard for seven days, of which three were spent in making repairs costing only $3688.76. However, it is equally clear that the members of Delome's crew were not doing the type of work traditionally performed by seamen. The record discloses that the UBL 550 entered Platzer's shipyard for minor structural repairs which necessitated drydocking the vessel. While the barge was not out of navigation, its flotation capability was, at least, impaired during the repair process. Moreover, cutting a large, heavy plate out of the forward rake including a winch truck and crane, not normally categorized as appurtenant to the vessel. Finally, whatever Delome's particular function may have been, his crew was engaged in a specialized task demanding training and skills not customarily found among seamen. To

summarize, the repairs undertaken were not such as could have been performed in the ordinary course of business in the shipping industry: They could have been accomplished only on a drydocked vessel, with special equipment, and by a trained crew of shipfitters, not seamen. Manifestly, then, the District Court's finding with respect to the type of work in which Delome and the other members of his crew were engaged was clearly erroneous. Therefore, Union owed Delome no warranty of seaworthiness since he was not even a *Sieracki* or *Hawn*[11] seaman."

Neither the navigable waters criterion nor the Extension Act encompasses Delome's negligence claim against Union. Certainly our disapprobation of the navigable waters limitation in unseaworthiness cases does not preclude its application in a common-law tort action. *See, e.g., Watz v. Zapata Off-Shore Co., supra* at 110. As we have said, Union owed Delome no warranty of seaworthiness. Furthermore, disputably the UBL 550 was inland, removed from navigable waters, at the time of Delome's accident. Consequently the District Court had no admiralty jurisdiction over the common-law negligence claim.

DIVERSITY JURISDICTION

Delome invoked, and the District Court assumed, admiralty jurisdiction under Rule 9(h) of the Federal Rules of Civil Procedure. Although we have held that the court had no admiralty jurisdiction, the court

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[11]Pope & Talbot, Inc. v. Hawn, 1953, 346 U.S. 406.

might have considered the negligence allegations — that Union had failed to provide Delome's crew with a reasonably safe place to work — under diversity principles. *See* 28 U.S.C.A. §1332. To determine whether such jurisdiction exists, we have reviewed Delome's complaint, as well as relevant portions of the trial transcript.

After averring that the case was within the admiralty and maritime jurisdiction, Delome noted in his complaint that he "is a resident of Orange County, Texas." Furthermore, he alleged:

> Defendant Union Barge Line Company is a foreign corporation or foreign business organization and the address of its home office is Dravo Bldg., 5th and Liberty Streets, Pittsburg 22, Pennsylvania; such Defendant does business in the State of Texas from time to time and the cause of action asserted herein arose in the State of Texas; that such Defendant does not maintain a regular office in the State of Texas nor has it designated an agent for service of process is the Secretary of State of the State of Texas under the provisions of Article 2031-b of the Texas Civil Statutes.

Examination of the complaint reveals two facts: First, Delome stated these allegations to obtain service of process under article 2031b, a long-arm statute, rather than to show diversity of citizenship. Second, Delome's allegations are insufficient to confer federal jurisdiction under 28 U.S.C.A. §1332. Standing alone, an alle-

gation that a party is a resident of a certain state is not a sufficient allegation of his citizenship in that state. *Pattiz v. Schwartz*, 8 Cir. 1968, 386 F.2d 300, 301; *core v. Clemmons*, 5 Cir. 1963, 323 F.2d 54, 58, *cert. denied*, 1964, 375 U.S. 992; *Texaco-Cities Service Pipe Line Co. v. Aetna Casualty & Surety Co.*, 8 Cir. 1960, 50 F.R.D. 195, 197. *See generally* 5 C. Wright & A. Miller, *Federal Practice and Procedure* § 1208 (1969). Moreover, an allegation that a corporation's home office is located in a certain state is not equivalent to a declaration that its principal place of business is situated in that state. *See, e.g., Anniston Soil Pipe Co. v. Central Foundry Co.*, N.D. Ala. 1963, 216 F. Supp. 473, *aff'd*, 5 Cir. 1964, 329 F.2d 313. *See also* 28 U.S.C.A. § 1332 (c).

We have discerned nothing in the remainder of the record to cure these defects. *See, e.g., DeVries v. Starr*, 10 Cir. 1968, 393 F.2d 9, 11. Consequently, the admiralty jurisdictional underpinning having been removed, and no diversity jurisdiction appearing, this Court cannot now consider Delome's substantive negligence claim.

The judgment of the District Court is vacated for lack of jurisdiction and the cause is remanded with directions that it be dismissed without prejudice.

VACATED and REMANDED with Directions.

APPENDIX B

JUDGMENT

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
BEAUMONT DIVISION

C. J. PAUL DELOME

versus Civil Action No. 6320

UNION BARGE LINE COMPANY

versus

PLATZER SHIPYARD, INC.

The above entitled action came on for trial before the Court without a jury on April 2, 1970, the plaintiff appearing in person and by his attorney, Ned Johnson, of the law firm of Waldman & Smallwood, the defendant, Union Barge Line Company, appearing by John D. Rienstra, and the third-party defendant, Platzer Shipyard, Inc., appearing by Dewey J. Gonsoulin, of the law firm of Mehaffy, Weber, Keith & Gonsoulin, and testimony having been offered and briefs filed by all parties, and the Court having filed its findings of fact and conclusions of law, and order for judgment, now, pursuant to said order, it is hereby

ORDERED and ADJUDGED that the plaintiff, C. J. Paul Delome, have judgment against the defendant,

Union Barge Line Company, in the sum of TWO HUNDRED THIRTEEN THOUSAND FOUR HUNDRED THIRTY-SEVEN AND 69/100 ($213,437.69) DOLLARS, together with interest upon said amount at the rate of six percent (6%) per annum from the date of this judgment, and for costs; but that the intervenor, American Mutual Liability Insurance Company, which is subrogated to the rights of C. J. Paul Delome, shall be entitled to recover the first TWENTY-ONE THOUSAND ELEVVEN AND 25/100 ($21,011.25) DOLLARS paid on said judgment by the defendant, Union Barge Line Company, together with interest upon said amount at the rate of six percent (6%) per annum from the date of this judgment.

It is further ORDERED and ADJUDGED that the plaintiff, C. J. Paul DeLome, have judgment against the defendant, Union Barge Line Company, for pre-judgment interest to be assessed from the date of injury, July 23, 1966, to the date of the judgment on EIGHTEEN THOUSAND ($18,000.00) DOLLARS at the rate of six percent (6%) per annum.

It is further ORDERED, ADJUDGED and DECREED by the Court that the defendant, Union Barge Line Company, have judgment for full indemnity against the third-party defendant, Platzer Shipyard, Inc., in the amount of TWO HUNDRED THIRTEEN THOUSAND FOUR HUNDRED THIRTY-SEVEN AND 69/100 ($213,437.69) DOLLARS, together with interest upon said amount at the rate of six percent (6%) per annum from the date of this judgment and for costs and for the further amount of pre-judgment interest

to be assessed from July 25, 1966, to the date of this judgment on EIGHTEEN THOUSAND ($18,000.00) DOLLARS at the rate of six percent (6%) per annum.

It is ORDERED that with respect to judgment for indemnity against Platzer Shipyard, Inc., Union Barge Line Company shall be entitled to execution thereon only to the extent and in the amounts actually paid to the plaintiff by reason of the judgment rendered herein against Union Barge Line Company.

DATED this 9th day of September, 1970.

/s/ WM. WAYNE JUSTICE
UNITED STATES DISTRICT JUDGE

APPENDIX C

In The United States District Court
For The Eastern District of Texas
Beaumont Division

C. J. Paul Delome

versus Civil Action No. 6320

Union Barge Line Company

versus

Platzer Shipyard, Inc.

The findings of fact and conclusions of law heretofore made and entered in the above entitled and numbered cause are hereby withdrawn, and the following are substituted:

FINDINGS OF FACT

(1) The barge of the defendant, Union Barge Line Company, was delivered to the third party defendant's ship repair facilities at Green's Bayou, Texas, on July 22, 1966. The vessel remained afloat in the slip at Green's Bayou for two days before being removed to a marine railway drydock for minor repairs lasting three days. After completion of these repairs which were made so that the vessel might continue in commerce and trade, the vessel left the third party defendant's facilities on July 29, 1966. The UBL 550 was

engaged in commerce and trade before entering the third party defendant's facilities for minor repairs of $3,688.76.

(2) The UBL 550 was not being deactivated or retired from commerce and trade during its brief visit to the third party defendant's ship repair facilities. There were no structural changes performed on this barge so as to constitute a conversion of the vessel from a barge to another type of vessel. The UBL 550 at all times material to this case was engaged in commerce and trade upon the navigable waters of the United States before entering the third party defendant's ship repair facilities for the purpose of undergoing minor repairs so that it might return to commerce and trade. The cost of repairs and the length of time that it took to complete these repairs indicate that the repairs were minor in nature.

(3) The UBL 550, on the date of the accident, July 25, 1966, was a vessel in navigation.

(4) The UBL 550 is classified as an open hopper cargo barge designed to carry cargo in an open hatch 9' 10" in depth.

(5) At the time of the delivery of this barge to the ship repair facilities, the barge did not have a cover of any type over the cargo hatch.

(6) The barge at the time of delivery to the ship repair facilities had a walkway 20" in width around the port and starboard side of the barge.

(7) The barge at the time of delivery to the ship repair facilities had a hatch coaming 3 5/16" high surrounding the open cargo hatch.

(8) At the time of the delivery of the vessel to the ship repair facilities there were brackets extending from the hatch coaming on the port side of this vessel part way out into the 20" walkway.

(9) At the time of delivery of the vessel to the ship repair facilities there were bits, commonly known as timberheads, approximately 9" in height and located in the walkway on the port side of the vessel.

(10) On the forward 20' of the vessel at the time of delivery on the port side there was a circular pumpwell cover extending up above the level of the walkway and located in the walkway itself.

(11) These brackets, bits, and raised pumpwell cover were located on the port side of the vessel at the immediate area where the plaintiff tripped as he was proceeding towards the forward rake. These brackets, bits and pumpwell cover presented to the plaintiff a trip hazard as they were located on the narrow 20" walkway in the immediate vicinity where the plaintiff tripped and fell over the hatch coaming. The presence of these trip hazards on the port side of this vessel created an unsafe passageway for the plaintiff to walk down while proceeding to the forward rake the night of July 25, 1966.

(12) The defendant's vessel, at the time of delivery to third party defendant's ship repair facilities, did not provide a safe place to work for those ship repairmen who could reasonably be expected to go aboard this vessel in the performance of the traditional duties of seamen in doing minor repair work in that the hatch coaming surrounding the open hatch area was not of sufficient height to prevent these men, including the plaintiff, from falling into the open hatch area. The plaintiff fell on the occasion in question into the open hatch area some ten feet below because the defendant failed to construct this vessel or provide this vessel with a hatch coaming at least three feet in height. The passageway on the port side of this vessel in the immediate vicinity where the plaintiff fell some 20 feet back from the bow was not a reasonably safe place to work because of the location of the trip hazards and the insufficient height of the hatch coaming. These unsafe conditions existed at the time of the delivery of the vessel to the third party defendant and such conditions were created solely by the defendant prior to delivery of the vessel to third party defendant's ship repair facilities.

(13) The hazardous and unsafe conditions presented by these trip areas and low hatch coaming were not transitory or created in any way by the third party defendant, Platzer Shipyard. These defects were inherent in nature and design of the vessel and were not a subject of the repair contract to be performed by the third party defendant. The unsafe passageway was not in any way created by the third party defendant. The repair contract did not call for work to be done on the

hatch coaming on the port side of this vessel, nor did it call for any work to be performed on the brackets, bits and pumpwell cover located in this narrow passageway on the port side. The passageway itself was not a subject matter of the repair contract.

(14) Plaintiff went to work at third party defendant's ship repair facilities at 3:30 p.m., on July 25, 1966. He proceeded to work on the forward rake of the UBL 550 performing his duties as a shipfitter. His work involved going inside the rake, which is a compartment concealed from the open cargo hatch area by a bulkhead. During the early afternoon he was able to get inside the rake by means of two holes in the forward rake where a plate and a knuckle had been removed. Around 10:00 o'clock that evening the plaintiff was instructed by his foreman, Robert Kershner, to go up on the vessel in order to get down into the forward rake by means of a manhole cover on the forward end of the barge. The spaces that the plaintiff had used to get into the forward rake had been closed and it was necessary for him to finish his work in the forward rake by using the only means available to gain access to this work area. Plaintiff proceeded to the port side of the vessel where he climbed a ladder which led to the narrow walkway some 20 feet from the bow. As he stepped off the ladder and turned toward the forward end of the vessel he was temporarily blinded by the glare for the 1000-watt bulb in the light located upon a pole some 30 feet high, approximately 15 feet from the port side of the vessel about even with the bow. He was in the process of taking a couple steps toward the forward rake when the light dazed him. Then he

tripped and fell over the short hatch coaming into the open area ten feet below. When the plaintiff turned and proceeded down this narrow walkway, he was in the immediate vicinity of the brackets, bit and the pumpwell cover which extended into the walkway and presented the trip hazard.

(15) Plaintiff had nothing to grab onto or to brace him to keep him from falling into the open hatch area. A three-foot solid hatch coaming would have prevented plaintiff from falling. Plaintiff had not been on this vessel before and had not been warned about the design defects on the walkway nor was he warned about the low hatch coaming. He was not aware that the open hatch area was unprotected before going aboard the vessel. The time that it took plaintiff to step off the ladder and turn and take one or two steps while he was momentarily blinded by the light and to trip and fall into the open hatch area was only a brief moment. Plaintiff was acting as a reasonably prudent man under the same or similar circumstances and did not have time to appreciate the hazardous, unsafe passageway that he was about to enter. Plaintiff at the time of the fall was doing that work traditionally performed by seamen in making minor repairs as a shipfitter.

(16) The passageway from which plaintiff fell was not reasonably fit for its intended purpose.

(17) Third party defendant knew prior to plaintiff's accident that the cargo bins on the UBL 550 were not covered and that the coaming adjacent thereto was

less than eighteen inches high, and such knowledge was obtained prior to any work being done on the barge.

(18) Third party defendant knew prior to the accident suffered by the plaintiff of the conditions of the walkway and such knowledge was obtained prior to any work being done on the barge.

(19) Third party defendant knew prior to plaintiff's accident that the on-shore light would shine directly into the eyes of men attempting to walk from the ladder to the bow rake, and such knowledge was obtained in sufficient time to eliminate said condition before the plaintiff fell.

(20) Third party defendant's failure to install a guard rail protecting the open cargo bin into which plaintiff fell was negligence and a proximate cause of the injuries and damages suffered by the plaintiff.

(21) In failing to install a guard rail protecting the open cargo bin into which the plaintiff fell, third party defendant failed to perform its contract of repairs with Union Barge Line Company in a good and workmanlike manner, and such failure was a proximate cause of the injuries and damages suffered by the plaintiff.

(22) Third party defendant failed to afford sufficient lighting on the walkway aboard the UBL 550, which failure was negligence and a proximate cause of the injuries and damages suffered by the plaintiff.

(23) In failing to afford sufficient lighting on the walkway aboard the UBL 550, third party defendant failed to perform its contract of repairs with Union Barge Line Company in a good and workmanlike manner, which failure was a proximate cause of the injuries and damages suffered by the plaintiff.

(24) Third party defendant was negligent in positioning its on-shore light where it would blind persons attempting to use the walkway aboard the UBL 550, and such negligence was a proximate cause of the injuries and damages suffered by the plaintiff.

(25) In positioning the on-shore light so as to blind persons attempting to use the walkway aboard the UBL 550, third party defendant failed to perform its contract of repairs with Union Barge Line Company in a good and workmanlike manner, which failure was a proximate cause of the injuries and damages suffered by the plaintiff.

(26) Third party defendant failed to provide the plaintiff with a safe means of ingress and egress to the work he was performing, and such failure was negligence and a proximate cause of the injuries and damages suffered by the plaintiff.

(27) Third party defendant failed to provide the plaintiff with a safe means of ingress and egress to the work he was performing which was a failure to perform its contract of repairs with Union Barge Line Company in a good and workmanlike manner, and

such failure was a proximate cause of the injuries and damages suffered by the plaintiff.

(28) Plaintiff was guilty of contributory negligence at the time and on the occasion of his injuries, by reason of the fact that he failed to ascertain if there was a guard rail protecting the open cargo bins; and such contributory negligence on his part constituted a proximate cause of his injuries. Plaintiff's own negligence contributed to his injuries, to the extent of five (5%) percent.

(29) Plaintiff was 28 years of age at the time of his injury and had a life expectancy of 42 years, and a work life expectancy to the age 65. Plaintiff was removed from the open hatch area by means of a basket and taken immediately to the Pasadena Bayshore Hospital where he was treated for a fractured wrist, hip and pelvic bone. He was readmitted to the Pasadena Hospital for bi-lateral hernia repairs. His back was giving him a considerable amount of difficulty during this time and he was subsequently sent to Orange Memorial Hospital in Orange, Texas, where a low back fusion was performed during his April 20, 1967, admission. Dr. Cloud, the orthopedic surgeon who performed the operation, determined that it was necessary for a second back fusion to be performed, in that the first one did not remain solid between the 4th and 5th lumbar vertebrae. Plaintiff was readmitted on January 30, 1968, to the Orange Memorial Hospital where a second lumbar fusion was performed by Dr. Cloud. Again this fusion failed to take between the 4th and 5th lumbar vertebrae, and Dr. Cloud, after review-

ing stress motion films, decided upon a third back fusion which was performed during the plaintiff's admission to the Orange Memorial Hospital of August 26, 1968. This fusion between the 4th and 5th lumbar vertebrae was again unsuccessful, and no further operations are recommended.

(30) Plaintiff has sustained fifty (50%) percent permanent disability to his body in general, and is unable to perform the normal tasks of a workman, including bending, stooping, lifting and climbing, and these disabilities will remain throughout the rest of his work life expectancy. Plaintiff has a tenth-grade education with a work history involving that of hard physical manual labor. He has not been trained in any specialized fields not involving hard physical labor. Plaintiff has sustained a loss of future earning capacity of $144,000.00 based upon fifty (50%) percent loss of earning capacity to the age 65. This figure represents the present value of the plaintiff's loss of future earning capacity, having been discounted to present value by five (5%) percent discount factor.

(31) Plaintiff has sustained a loss of past earnings of $13,000 over and above that amount of lost past earnings which was computed in the loss of future earning capacity from the date of the accident.

(32) Plaintiff has sustained past medical expenses which were reasonable and necessary for his treatment in the amount of $7,671.25.

(33) Plaintiff's condition will require future medical expenses for the remainder of his life expectancy of $15,000. This figure has been discounted to its present value.

(34) Plaintiff has suffered damages for past mental and physical pain and suffering in the amount of $5,-000.

(35) Plaintiff will in all probability suffer damages for future mental and physical pain and suffering over the remaining 42 years of his life expectancy, in the amount of $40,000. This figure has been discounted to its present value.

CONCLUSIONS OF LAW

(1) The walkway on the port side of the vessel was unseaworthy and a contributing cause of plaintiff's injuries and damages.

(2) The hatch coaming guarding the open hatch on the port side of defendant's vessel was unseaworthy and a contributing cause of plaintiff's injuries and damages.

(3) The walkway on the port side of defendant's vessel was unseaworthy at the time of delivery of said vessel to third party defendant's ship repair facility.

(4) The defendant, Union Barge Line Company, had a non-delegable duty to provide plaintiff with a seaworthy walkway. The walkway conditions are creat-

ed solely by the defendant, Union Barge Line Company, and were not transitory in nature. The repair contract did not provide for any work to be done upon this unseaworthy walkway, or was any work actually performed by the third party defendant's employees upon this walkway. The unseaworthy conditions existed at the time of delivery of the vessel and these conditions were not a subject of the repair contract, thus the defendant's Union Barge Line Company's, non-delegable duty to provide those persons performing the traditional duties of a seaman continued to exist even though control of the barge was in the hands of the third party defendant.

(5) Likewise, the defendant, Union Barge Line Company, had a non-delegable duty to provide the plaintiff with a hatch coaming at least three feet in height, and the failure of this duty constitutes unseaworthiness. This non-delegable duty existed even though control of the vessel was in the hands of third party defendant, for the reason that the hatch coaming was not a subject matter of the repair contract and the unseaworthy condition was not transitory or created by the third party defendant. Defendant delivered certain parts of its vessel in an unseaworthy condition knowing that ship repairmen would be exposed to these conditions which were not subjects of the repair contract.

(6) The defendant, Union Barge Line Company, further owed a non-delegable duty to provide a seaworthy walkway and hatch coaming protection, in that the UBL 550 was at all times material to this case a vessel in navigation, and the plaintiff was performing

the traditional duties of a seaman in making minor repairs as a shipfitter. Plaintiff was exposed to the hazards of a seaman in trying to walk down an unseaworthy walkout without the benefit of a hatch coaming to prevent him from falling, or without the benefit of a wide unobstructed walkway.

(7) The defendant, Union Barge Line Company, was negligent in failing to provide plaintiff with a reasonably safe place to work and such negligence was a proximate cause of plaintiff's injuries and damages. The defendant owed to plaintiff this non-delegable duty to those parts of the vessel which were not subjects of the repair contracts, and the defendant failed in this duty in providing a walkway obstructed by brackets, timberheads, a raised pumpwell cover, and inadequate hatch coaming around the open cargo hatch.

(8) Except as above specified, the plaintiff, at the time of his fall, was acting as a reasonably prudent man under the same or similar circumstances and was required to assume the risk of hazardous and unsafe conditions created by the defendant and is thus not contributorily negligent, for assumption of risk cannot be applied as a defense in the admiralty action, nor can the term contributory negligence be substituted in its place.

(9) The plaintiff is entitled to pre-judgment interest at six (6%) percent per annum from July 25, 1966, until the entry of final judgment on that amount of damages awarded for past mental and physical pain and

suffering in the amount of $5,000, and on that amount of damages sustained as loss of past earnings in the amount of $13,000.

(10) The plaintiff is entitled to judgment herein together with costs against defendant, Union Barge Line Company, with interest at six (6%) percent per annum to begin upon the entry of final judgment which is to be submitted by the plaintiff within ten (10) days.

(11) Third party defendant, Platzer Shipyard, Inc., having been guilty of negligence proximately causing the injuries and damages to the plaintiff and having breached its warranty owed to the defendant to perform its contract of repairs in a good and workmanlike manner, is obligated to indemnify defendant, Union Barge Line Company, for any and all sums which said defendant is required to pay to the plaintiff by reason of the accident made the basis of this suit.

(12) Plaintiff's contributory negligence, in failing to ascertain if there was a guard rail protecting the open cargo bins, constituted a proximate cause of his injuries. Such negligence on the part of the plaintiff contributed to his injuries to the extent of five (5%) percent, and the damages sustained by plaintiff should be diminished by such percentage.

SIGNED and ENTERED this 31st day of July 1970.

/s/ WM. WAYNE JUSTICE
UNITED STATES DISTRICT
JUDGE

APPENDIX D

In The United States Court Of Appeals
For The Fifth Circuit

No. 31,037

C. J. Paul Delome,

Appellee

versus

Union Barge Line Company,

Appellant

versus

Platzer Shipyard, Inc.,

Appellant

APPELLEE'S SUGGESTION FOR REHEARING EN BANC or in the alternative, PETITION FOR REHEARING

Wayne Patterson
2300 Memorial Boulevard
Port Arthur, Texas 77640

Sanders and Sanders
230 San Jacinto Building
Beaumont, Texas 77701

Waldman, Smallwood, Johnson & Rafes
320 College
Beaumont, Texas 77701

Bill J. Sanders of Sanders & Sanders
and
Ned Johnson of Waldman, Smallwood, Johnson & Rafes
Of Counsel

INDEX OF AUTHORITIES

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INDEX OF TEXTS

Extension of Admiralty Jurisdiction Act

TO THE HONORABLE JUDGES OF THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT:

COMES NOW plaintiff-appellee, C. J. Paul Delome, filing this suggestion for rehearing en banc regarding two critical areas of national interest to the maritime bar and would respectfully show as follows:

I.

Appellee filed suit in the United States District Court for the Eastern District of Texas, Beaumont Division, pursuant to Rule 9(h) of the Federal Rules of Civil Procedure envoking the general maritime law for personal injuries sustained while working aboard an unmanned barge upon a marine railway drydock at the third party appellant's ship repair facilities in Houston, Texas. The trial judge, after hearing the evidence, and reviewing pre-trial and post-trial briefs, found that the vessel was "in navigation" while in the ship repair facilities and that the appellee was "performing the traditional duties of a seaman" as a repairman aboard this vessel. The maritime jurisdiction question was not in issue at the trial court level. Judgment was entered for the appellee based both on the unseaworthiness of the vessel and the negligence of the vessel

owner in failing to provide a reasonably safe place to work for those classes of persons such as appellee who could reasonably be anticipated to come aboard the vessel to perform these minor repairs. The vessel owner and the ship repairer appealed and this Court vacated and remanded with directions on June 8, 1971, in a majority opinion by the Honorable Judge Dyer.

II.

Judgment for the appellee was vacated on two separate grounds. The appellate Court held that the trial judge's finding of fact that this shipfitter was performing the "traditional duties of a seaman" was "clearly erroneous", thus not entitling the injured party to the humanitarian protection of the doctrine of seaworthiness. Secondly, the Court held that there was no maritime jurisdiction on which to base a negligence claim for failure to provide a reasonably safe place in which to work upon a vessel resting upon a marine railway drydock some sixty feet from the edge of navigable waters. Appellee respectfully suggests that these two critical issues must be resolved with some degree of certainty in this Circuit to provide the maritime bar with guidelines as to the merits and jurisdiction of these third party ship repair claims.

III.

The tests that have been followed by this Circuit regarding whether or not the duty to provide a seaworthy vessel extends in any individual case to a ship

repairman have been derived from *West v. United States,* 4 L. Ed. 2d 161, as annunciated in *Watz v. Zapaas Off Shore Co.,* 431 F. 2d 100, (5th Cir. 1970). The status of the ship; the pattern of the repairs; and the extent of the work contracted for are the present guidelines material to this issue. In the case at bar, the Court agreed with the trial judge's fact finding that the vessel was in navigation stating:

> "Applying these variables in the factual context *sub judice,* it is clear that the UBL 550 was a vessel in navigation undergoing minor repairs at the time of Delome's injury. The barge remained at the shipyard for seven days, which three were spent in making repairs costing only $3,688.76."

In *Watz* the Fifth Circuit held that it was unnecessary to "review the repair project as a whole" rather than a ship repairman's specific assignment in making a determination as to whether or not the ship repairman was performing those traditional duties of a seaman. In this regard the trial judge found that:

> "The UBL 550 was not being deactivated or retired from commerce and trade during its brief visit to the third party defendant's ship repair facilities. There were no structural changes performed on this barge so as to constitute a conversion of the vessel from a barge to another type of vessel. The UBL 550 at all times material to this case was engaged in commerce and trade upon the navigable

> waters of the United States before entering the third party defendant's ship repair facilities for the purpose of undergoing minor repairs so that it might return to commerce and trade. The cost of repairs and the length of time that it took to complete these repairs indicate that the repairs were minor in nature."

Thus, the trial judge has, in effect, found that the "repair project as a whole" was minor in nature, considering both the monetary amount and the time spent effectuating those repairs; and that these repairs were made so that the vessel might return to commerce and trade. Clearly, when reviewing the repair project as a whole, it is evident that these are the types of repairs traditionally made by seamen. The warranty of seaworthiness was not denied the ship repairman in *West* because of some specialized type of modern equipment or division of labor; it was not given because of the status of the vessel, and in reviewing that status, the Court found that the reactivation of a vessel was not that type of work traditionally done by seamen. In the case at bar, the record demonstrates through the expert testimony of Captain Vandergrift, when questioned by the court from the bench, that the type of repairs performed aboard the vessel in question were those traditionally done by seamen. The court asked Captain Vandergrift:

> "All right, now, there is some question about whether or not the work that was being done by the plaintiff here was work which is traditionally done by seamen or he was doing work

that was in the past at least traditionally done by seamen, was this hull or shell repair work that which is traditionally done by seamen?"

To which the witness replied:

"Yes, sir. Back in the old days, in fact, they carried ship's carpenters, primarily for the repair of various portions of the ship, they were wooden ships then. But still it is very old and traditional that a seaman is responsible for the upkeep, repair, and maneuvering his vessel under the command of the officers."

The Court:
"What about frame repair, would that be work that was traditionally done by seamen?"

The witness:
"I never heard of the tradition, the traditions, I believe, are still accepted under the law, framework, yes, they had wooden frames. They would replace wooden framework. Modern practice makes it cheaper to take it to the shipyard now."

Captain Vandergrift also testified that in the old days it was the traditional duty of seamen to make various repairs to the vessel and he went on to say in answer to the following question:

"I see. And this has become more or less a specialized industry now, is that correct?"

> Answer: "Yes, sir, because now you are using skilled vessels, etc., they require special equipment and although some ships carry welding equipment and other facilities it is not too common. So it is easier to get that work done on shore." (Record, Vol. II, page 403).

This testimony by a qualified expert witness regarding a fact question to be determined by a trial judge who sets in a position to judge the veracity and integrity of the witness as well as his qualification should not be overturned as has been done in this case by a label of "clearly erroneous."

McAllister v. United States, 348 U.S. 19, dictates that the trial judge's judgment on fact findings supported by the evidence is not to be reversed by the reviewing court.

The appellate court in the case at bar found that the appellee was not doing the traditional duties of a seaman in that the work being performed on the bow of the vessel "required special equipment, including a winch truck and crane, not categorized as appurtenant to the vessel." The Court went on to say that the appellee's crew was engaged in a specialized task demanding training and skills not customarily found among seamen and that the repairs undertaken were not such as could have been performed in the ordinary course of business in the shipping industry. This ruling by the appellate court regarding specialized equipment, specialized skills, specialized training, will, in effect, eliminate substantially all third party ship repair cases by

ship repairmen against the vessel owner. Certainly, if the appellee in the case at bar, who was a shipfitter, engaged in the business of repairing vessels that came into the ship repair facilities, is denied the warranty of seaworthiness because he was a shipfitter using modern equipment not available to shipfitters of old in this day of divisions of skills, then all ship repairmen such as welders, who use blow torches; pipefitters, whose pipes are lifted aboard by modern mechanized shoreside equipment; electricians, who use electronics as testing equipment; mechanics, who use tools unheard of by sailors on Yankee Clippers * * * all of these repairmen * * * who perform minor repairs aboard vessels deemed to be in navigation would be denied the humanitarian doctrine of seaworthiness which has been extended to them in *Sea Shipping Co., Inc. v. Sieracki*, 328 U.S. 85. This is the clear warning given to this Circuit by Chief Judge John R. Brown in his dissenting opinion in *Johnson v. Oil Transport Co.*, 440 F. 2d 109 (5th Cir. 1971), wherein Judge Brown stated:

> "Recognizing, therefore, that the answer is not easy I nevertheless think this opinion, when considered with other recent ones see e.g. Drake v. Dupont de Neumours & Co., Inc., 5th Cir. 1970, 432 F. 2d 276, 1970 A.M.C., 1915, is driving us to a position which becomes more and more inflexible and effectively waters down protection which the law gives to Sieracki-Bryan-Yacca (Omitting cites)* * * Second, with a Richard Dana *Two Years Before the Mast* approach we are measuring the ac-

> tivities of the worker as though the tools and facilities of a Yankee Clipper were the guideline for the twentieth century. Todays sailors — free from any real prospect of being shanghied or his health destroyed from an absence of the daily ration of any anti-scorbutics — is everywhere using sophisticated equipment and technics of which radar and electronic-fire-detecting devices, are examples, not to mention the exacting activities of crew members of our nuclear submarine fleet or the atomic A/V SAVANNAH. This expands his role beyond the simple task of one who can hand, reef and steer. (omitting foot notes)."

Judge Brown went on to say that the ship repairman in *Johnscn* was performing sandblasting work and that this work had been traditionally been performed by seamen but without the modern equipment of a sandblaster — that is, in the old days the paint and rust would be chipped off with hand tools rather than the sand blaster. The common sense approach to this problem of the "traditional duties of a seaman" does not evolve around the type of equipment or training necessary for the job, but instead, it encompasses the nature of the repair project as a whole in relation to the vessels' status. If this Circuit is to accept the documentary approach of specialized equipment and specialized training in these ship repair cases, there will be no third party actions maintainable, because all ship repairmen of the various trade unions such as pipefitters or welders possess some degree of specialized training in their field which this Circuit could

grasp as criteria for reversing the trial judges' fact finding.

Why has the doctrine of seaworthiness been extended to those who perform traditional duties of seamen? The answer is simple. These men who work aboard vessels "in navigation" are subject to the same risks as their counterparts, the blue water seamen. The appellee in the case at bar encountered a defective design in this barge in that the walkway around the open hatch coaming was too narrow, cluttered with trip hazards, and the hatch coaming was not of sufficient height to keep this *Sieracki* seaman or a blue water seaman from falling into the open hatch. This repairman experienced the same hazards and unseaworthy conditions that were inherent in the design of this unseaworthy vessel as would a longshoreman or member of the crew of a tug. What rationale can be given for denying this man the protection of the doctrine that came into existence for those exposed to the hazards of an unseaworthy vessel, when it is undisputed that the vessel is "in navigation". *Pope v. Hawn*, 346 U. S. 406. Appellee strenuously contends that this Court in an en banc hearing should clear the air regarding the issue of whether or not specialized training and modern day equipment will negate a finding of work traditionally performed by a seaman solely because the seamen of old did not have this type of equipment or training available to them. There is no logic which can support this position. The work being performed in the case at bar was the replacing and repairing of damaged plates and beams on the vessel. Naturally, in the days of wooden sailing merchant vessels, wooden planks and beams were used in lieu of plates. Winches and

trucks were not available to place the wooden planks into position, thus, by the very nature of technological advances, the work of ship repairmen have become specialized in the various divisions of labor for the benefit of the vessel owners themselves who should not be entitled to extinguish the non-delegable duty to provide a seaworthy vessel upon delivery to the ship repair facilities especially where, as in the case at bar, the unseaworthiness was not a subject matter of the repair contract. Support of appellee's contention that modern equipment, specialization, and division of labor is not the criteria for denying the warranty of seaworthiness to shore based workers can be found primarily in *Sieracki* and *Deffes v. Federal Barge Lines Inc.* 361 F. 2d 422, (5th Cir. 1966). In *Deffes* the Court cited with approval from *Sieracki* stating:

> "(T)he hazards of marine service which unseaworthiness places on the men who perform it * * * *, together with their helplessness to ward off such perils and the harshness of forcing them to shoulder alone the resulting personal disability and loss, have been thought to justify and require putting the burden, insofar as it is measurable in money, upon the owner regardless of his fault. * * * The owner * * * is in position, as the worker is not to distribute the loss in the shipping community which receives the service and should bear its costs. * * * This policy is not confined to seamen who perform the ship's service under immediate hire of the owner, but extends to those who render it with his consent or by his arrangement. All the con-

> siderations which gave birth to the liability and have shaped its absolute character dictate that the owner should not be free to nullify it by partialing out his operations to immediary employees whose sole business is to take over portions of the ship's work or by other devices which would strip the men performing its services of the historical protection. The risks themselves arise from and/or incident in fact to the service. * * * (The owner's) ability to distribute the loss over the industry is not lessened by the fact that the men who do the work are employed and furnished by another. Historically, the work of loading and unloading is the work of the ship's service performed until recent times by the members of the crew. * * * That the owner seeks to have it done with the advantages of more modern divisions of labor, does not minimize the workers hazards and should not nullify his protection. * * * It seems, therefore that when a man is performing a function essential to maritime service aboard a ship the fortuitous circumstances of his employment by the ship owner or a stevedore contractor should not determine the measure of his rights."

The Court in *Deffes*, after review of *Sieracki*, stated:

> "Loading and unloading is clearly held to be 'work of a ship service'. * * * Therefore, there can be no doubt that he is within the scope of the doctrine."

The Court in *Deffes* is in effect, stating that loading and unloading by stevedores is work in the ship's service, and it makes no difference, as the Court held, that the work is being performed with modernized shoreside cranes that were not available to a seaman in the loading and unloading process in the olden days. This holding in *Deffes* is completely analogous to the case at bar wherein the minor repair work is clearly work in the ship's service and the fact that they lift metal plates instead of wooden beams, and have winch trucks in lieu of manual labor in hauling the hull sections into place, is immaterial to the question of traditional duties. The issue is whether or not the work is in the ship's service and not the type of equipment that is being utilized to perform the work. The Court in *Deffes* went on to further analyze *Sieracki* in regard to the modern division of labor stating:

> "The Supreme Court in Sieracki, however, attempts to negate this type of limitation upon the concepts of unseaworthiness. As stated there, 'the ship owner is at liberty to conduct his business by securing the advantages of specialization in labor and skill brought about by modern divisions of labor. He is not at liberty by doing this to discard his traditional responsibilities.' 328 U. S. at 100, 66 S. Ct. at 880. *McKnight* and the district court would permit the ship owner to escape liability by merely substituting a more modern method of performing the traditional work of seamen. We can find no support in the Supreme Court cases for adopting such a position. Nor can we find a ra-

> tional basis for drawing this distinction. If one is performing seamen's work by definition he must be subjecting himself to the seamen's hazard, no matter what type of equipment he is using to do the work."

The Fifth Circuit in *Deffes* has adopted a logical and rational approach to the effect of modernization, technical advances, specialized training, and skills when related to a man performing work "in the ship's service". Once it has been established as in the case at bar, that the vessel is in navigation, then these ship repair cases are completely analogous with the longshore third party actions in that the only issue is whether or not the overall project is that type of work done by seamen. Modern divisions of labor and equipment cannot effect the status of those *Sieracki* seamen unloading vessels in navigation, nor should they effect the ship repairmen performing minor repairs aboard a vessel in navigation in the ship's service as in the case at bar.

The facts in *Drake v. E. I. Dupont de Nemours & Co.*, 432 F. 2d 276 (5th Cir. 1970), are not analogous to the case at bar in that Drake was a specialized type of welder whose background required special knowledge and training over and above those requirements possessed by normal welders, and magnaflux and x-ray operations were required as an integral part of the welding operation. The appellee in the case at bar had no specialized schooling, training or education to qualify him for the job of shipfitter. He was merely one of the group of repairmen who handled these plates, placing them in their proper location the same as seamen

of old placed wooden beams and planks in place performing minor repairs. The fact that a winch truck and crane was used to assist in placing these plates in place or in carrying heavy loads, no more negates the warranty of seaworthiness than when a shoreside crane is used during the loading and unloading operations performed by stevedores. Both are covered by the warranty. The fact that this vessel was on a marine railway drydock cannot be construed to mean that this shipfitter was not performing the traditional duties of a seaman in effectuating minor repairs. *Allen v. Union Barge Lines,* 361 F. 2d 217 (5th Cir. 1966). *Drake* is in conflict with *Deffes* regarding the issue of modernization and specialization.

This Court is urged by the appellee to sit en banc to determine whether or not the use of some specialized equipment and training by ship repairmen performing minor repairs aboard a vessel in navigation will, in itself, as a matter of law, negate a finding of performance of the traditional duties of a seaman. Appellee contends and adopts the Honorable Chief Judge John Brown's opinion that the Supreme Court has itself abandoned the rigid standards of *Halecki* in *Jackson v. Lykes Bros. Steamship Co., Inc.*, 386 U.S. 731 (1967) wherein that Court stated in note 4 of that opinion:

> "Subsequent decisions in line with the general concepts put forth by this Court have read Sieracki expansively, and a wide range of maritime employees have been granted the benefits of the seaworthiness doctrine. Carpen-

> ters, electricians, ship cleaners, repairmen, and riggers who perform jobs formerly done by seamen, have recovered from ship owners on the seaworthiness doctrine." (Omitting cites)

The test is clearly whether or not the repair project itself was of the nature of work "formerly done by seamen". The replacing of plates and other various minor repairs aboard the vessel in question were the type of repairs made by shippers in olden days, regardless of any new and specialized equipment that might now be used that was not available at that time. The Supreme Court has ruled that technological advances and equipment such as shorebased cranes cannot be used to negate the warranty of seaworthiness to those loading and unloading vessels. How can specialized equipment and training, if it did exist in any degree in the case at bar, be used to negate the warranty of seaworthiness to this ship repairman? The appellate court's decision in the case at bar runs head on into this analogy of the mechanization and modernization in the longshore industry and cannot be rationalized, justified or sounded in logic. The trial judge's fact finding based upon expert testimony regarding the traditional duties of seamen should not be overturned and is not "clearly erroneous" regardless of whether or not this Court adopts the principle of logic as annunciated by *Sieracki, Jackson* and *Deffes.*

IV.

A second compelling reason for an en banc hearing is the necessity for clarity and certainty in an injured ship repairman's remedy against the vessel owner when this injury occurs upon a vessel "in navigation" upon a marine railway drydock located over the land but extending into the navigable waters. The appellate court in the case at bar has held that there is maritime jurisdiction over the seaworthiness claim, but there is no common law federal maritime jurisdiction over the appellee's negligence claim, and that said claim would have to be filed pursuant to diversity requirements. This holding creates mass confusion and would lead to bizarre results in the prosecution of these third party ship repair cases. For instance, the ship repairman would have to file a Rule 9(h) case alleging unseaworthiness, if he were injured aboard a vessel upon a marine railway drydock, and at the same time, with a different statute of limitations, and a different set of law applying, he would file a straight negligence claim against the vessel owner. The unseaworthiness claim would not be subject to a jury trial but the defendant in the diversity action would be entitled to a jury. The diversity action would apply the state law which, of course, in Texas does not encompass the doctrine of comparative negligence, and assumption of the risk would be a defense. To the contrary, the 9(h) unseaworthiness claim would be a trial before the court with comparative negligence and with assumption of risk not being a meritorious defense. How could both these separate causes of action be consolidated into one trial to expedite the overloaded

docket system. By necessity, it would require, in most cases, two separate trials applying two different standards of law. This result is not compatible with the expeditious prosecution of claims in the same forum.

V.

The appellate court in finding jurisdiction of the seaworthiness claim over the appellee by necessity agreed that the vessel in question was "in navigation". As the Court itself stated, a vessel in navigation is "engaged as an instrument of commerce and transportation *on navigable waters.*" (Omitting cites) (Emphasis added). The reviewing Court recognized that this definition "in navigation" had been diluted, twisted, and expanded to cover vessels undergoing minor repairs on drydocks, marine or otherwise. Why has this liberal interpretation been applied to the term "in navigation"? The answer is evident in that the Supreme Court desired to extend the right to recover to persons exposed to injuries in the ship's service since they are subject to the same hazards as blue water seamen. For what reason does this Court not provide maritime jurisdiction pursuant to the Extension of Admiralty Jurisdiction Act when the Act itself imposes the same requirement *** that is, that the injury be caused by a vessel *on navigable waters* even though the locality of the tort is landbased.

To have any uniformity in these maritime third party ship repair cases, the term "vessel on navigable waters" must be given the same definition and interpretation to both negligence and unseaworthiness

claims, otherwise, you will have the above mentioned bizarre results. It is evident that many inroads have been made in maritime personal injury actions upon a strict "locality test". The Act itself states that the injury is maritime in nature even if the injury occurs upon land. Thus, under this Act, the situs of the impact of the negligent act or omission is not the determining criteria for maritime jurisdiction. The unescapable conclusion is that the courts will now look for a "maritime contact test". The analogy between *Gutierrez v. Waterman Steamship Corp.*, 373 U.S. 206 (1963), and the case at bar can clearly be drawn. In *Gutierrez* the longshoreman was injured on a pier when he slipped on beans that had been spilled from the defective cargo bag. The Court held, in part, that maritime jurisdiction existed where it is alleged that the ship owner committed a tort while or *before* the ship was being unloaded, the impact of which was felt ashore at a time and place not remote from the wrongful act. The defective cargo bags containing these beans were defective before the vessel ever arrived at the dock where these *Sieracki* seaman came into play in the unloading process. In the case at bar the trial judge found that the vessel owner was negligent in not constructing a reasonably safe hatch coaming or walkway around the sides of this open hopper barge before this vessel ever arrived at the ship repair facilities. In both cases the vessel owner's negligence existed while the vessel was upon navigable waters with the damage being consummated on land. The negligent condition was present when both sets of *Sieracki* seamen began their task. The case at bar is stronger in that appellee was aboard the vessel at the time of injury and the

unsafe condition was directly related to the vessel's design and structure and not to the cargo.

It is the maritime connections and contacts that give maritime jurisdiction under this Act. How could there be more maritime contacts than to have a vessel found "to be in navigation" undergoing minor repairs necessary to the vessel's return to commerce and trade? The appellee was subject to the same hazards and negligent conditions as were blue water seamen who walked down this same narrow walkway without the aid of rails or hatch coamings to protect them from falling into the twelve foot open hatch. Marine railway drydocks are covered under federal jurisdiction pursuant to the Longshoreman and Harbor Workers' Compensation Act the same as floating drydocks. Why should there be a distinction in maritime jurisdiction when the term "caused by a vessel on navigable waters" can be made to conform with the same definition applied to the term "in navigation" in an unseaworthiness claim? Both vessels, in the case at bar and in *Gutierrez* were vessels in navigation and the hazards that extended to the longshoremen and to the ship repairmen were hazards created by the vessel owner. How can the two cases be distinguished? It was the actual design defect of the vessel itself in the case at bar which was the proximate cause of the injury. Is this Court to strictly construe the terms of the Extension of Admiralty Act so as to prevent jurisdiction in this case and allow it in an identical fact situation case where the vessel is in drydock where there is temporarily water underneath the vessel? There can be no justification for strict interpretation of admiralty

jurisdiction since it is clear under the Act that the Courts are to be concerned with maritime connections rather than the situs of the tort.

In conclusion, appellee would respectfully suggest that this Honorable Court set en banc to establish reliable guidelines for trial judges when determining whether a man is "performing the traditional duties of a seaman" and to strike from this determination the aborted concept negating the duty of seaworthiness because modernization and specialization were not available to seamen performing minor repairs in years gone by. Appellee additionally requests an en banc rehearing on the issue of maritime jurisdiction pursuant to the Extension of Admiralty Jurisdictional Act so that the trial judges, of this Circuit, and the maritime bar will know with certainty whether or not the terms "on navigable waters" are to be defined in a liberal and expanded view as in the definition of the term "in navigation", or to be restricted without logic or reasoning to an injury caused by a vessel actually on water at the time of the injury. In the alternative, appellee-petitioner petitions this Honorable Court for rehearing on the above mentioned issues pursuant to Rule 40 of the Appellate Rules of Civil Procedure.

Respectfully submitted,

WALDMAN, SMALLWOOD,
JOHNSON & RAFES

BY _____

NED JOHNSON
320 College
Beaumont, Texas 77701

I hereby certify that a copy of the foregoing has been furnished the attorneys for the appellants this 30th day of June, 1971.

_____

Attorney for Appellee

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 31037

C. J. PAUL DELOME,
Plaintiff-Appellee,

versus

UNION BARGE LINE COMPANY, ET AL.,
Defendants-Third Party
Plaintiffs-
Appellants-Cross Appellees,

versus

PLATZER SHIPYARD, INC.,
Third Party Defendant-
Appellee-
Cross Appellant.

Appeal from the United States District Court for the Eastern District of Texas

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ON PETITION FOR REHEARING AND PETITION FOR REHEARING EN BANC

(Opinion June 8, 1971, 5 Cir., 1971, ____ F.2d ____).

(July 19, 1971)

Before O'SULLIVAN,* THORNBERRY and DYER, Circuit Judges.

PER CURIAM: The Petition for Rehearing is DENIED and no member of this panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc, (Rule 35 Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 12) the Petition for Rehearing En Banc is DENIED.

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*Senior Circuit Judge, 6th Circuit, sitting by designation.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

NO. 71-454

C. J. PAUL DELOME, *Petitioner*

v.

UNION BARGE LINE COMPANY, *Respondent*

v.

PLATZER SHIPYARD, INC., *Respondent*

REPLY TO PETITION FOR WRIT OF CERTIORARI

MEHAFFY, WEBER, KEITH
& GONSOULIN
1400 San Jacinto Building
Beaumont, Texas 77701
Attorneys for Respondent
Platzer Shipyard, Inc.

DEWEY J. GONSOULIN
Of Counsel

Alpha Law Brief Co., M & M Bldg., Houston, Texas 77002

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IN THE

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OCTOBER TERM, 1971

NO. 71-454

C. J. PAUL DELOME, *Petitioner*

v.

UNION BARGE LINE COMPANY, *Respondent*

v.

PLATZER SHIPYARD, INC., *Respondent*

REPLY TO PETITION FOR WRIT OF CERTIORARI

To The Supreme Court Of The United States:

Respondent, Platzer Shipyard, Inc., respectfully prays that the Petition for Writ of Certiorari in this matter be in all things denied.

OPINION BELOW

The opinion of the Court of Appeals is included in the addendum to this Reply and is reported at 444 F.2d 225 (5th Cir. 1971).

JURISDICTION

The Trial Court's jurisdiction was invoked by the petitioner's allegations that this was an admiralty or maritime claim within the meaning of Rule 9(h), F.R.C.P. The Court of Appeals reversed and dismissed the case without prejudice for lack of admiralty jurisdiction since the petitioner's injuries neither occurred on navigable waters nor were they caused by a vessel on navigable waters. This Court's jurisdiction may be invoked under 28 U.S.C. §1254(1).

QUESTIONS PRESENTED

1. Whether admiralty or maritime jurisdiction exists in this case where the petitioner's injuries neither occurred on navigable waters nor were they caused by a vessel on navigable waters.
2. Whether Union Barge Line Company owed a duty of seaworthiness to C. J. Paul Delome, i.e., was the vessel in navigation and was Delome performing the traditional duties of a seaman.
3. Whether C. J. Paul Delome has a maritime cause of action for negligence against Union Barge Line Company, since Delome's injury neither occurred on navigable water nor was it caused by a vessel on navigable water, and the barge UPL was in the exclusive custody and control of Platzer Shipyard, Inc.

STATUTES INVOLVED

The only statute involved is the Extension of Admiralty Jurisdiction Act of 1948,[1] providing as follows:

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1. 62 Stat. 496, 46 U.S.C. §740.

"The admiralty and maritime jurisdiction of the United States shall extend to and include all cases of damage or injury, to person or property, caused by a vessel on navigable water, notwithstanding that such damage or injury be done or consummated on land."

STATEMENT OF THE CASE

The petitioner, C. J. Paul Delome, was injured on July 25, 1966 while working for Platzer Shipyard, Inc.[2] aboard the barge UBL 550 owned by Union Barge Line Company,[3] which was undergoing repairs at Platzer's shipyard near Houston, Texas. At the time of the accident the open hopper cargo barge was on a marine railway drydock drawn up completely out of the water and entirely over dry land. The petitioner was walking at night along a walkway on the portside of the barge when he tripped and fell into the open barge, thereby sustaining the injuries for which this suit was brought.

After collecting compensation under the U. S. Longshoremen's and Harbor Workers' Compensation Act[4] from the compensation carrier for Platzer, Delome filed suit for damages against Union Barge, alleging that this was a case of admiralty and maritime jurisdiction and an admiralty or maritime claim within the meaning of Rule 9(h).[5] In his claim against Union Barge, Delome alleged that the barge was in navigation and he was doing work traditionally done by seamen, and thus he was protected by the warranty of seaworthiness. In the alternative,

2. Hereinafter called Platzer.

3. Hereinafter called Union Barge.

4. 33 U.S.C.A. §901, et seq.

5. Plaintiff's Complaint, R. 1.

Delome alleged that Union Barge failed to provide him with a safe place to work and was guilty of negligence proximately causing his injuries. Union Barge impleaded Platzer, seeking indemnity or contribution, and alleging that Platzer was negligent or had breached its implied warranty to do its repair work in a workmanlike manner.

On the trial of this case before the Court without a jury, Delome testified that he was working for Platzer on July 25, 1966 as a shipfitter at Green's Bayou, Houston (R. 105) on a UBL barge which was on a marine railway drydock (R. 113); that there was no water underneath the drydock while Delome was working on it (R. 114); that he was instructed by his foreman to climb up a ladder and go to the forward rake of the barge so he could cut a plate to fit underneath the barge (R. 114); that his accident occurred at approximately 10:15 at night (R. 115); that after he got off the ladder he turned to the left and a light from on the shore blinded him and he went ahead and took a few steps and tripped on something and fell inside the open hold of the barge (R. 115); that he did not know what he tripped on (R. 115); that he was on the left side of the barge as he faced the forward rake when he fell (R. 115); that the spotlight was onshore to the left and sort of in front of him (R. 115); that it was about 15 to 20 feet from the ladder to the bow of the barge (R. 166, 252); that the light which blinded him was located onshore on a permanent telephone pole about 15 to 20 feet from Delome (R. 218, 255-256); that the barge was an open hopper dry cargo barge (R. 240); that the barge was not on a floating drydock but was on a marine railway type of drydock, with railway tracks that ran from down in the water upon the shore (R. 240), so that the barge was resting on the railway

tracks and the tracks were resting on land (R. 241); that the barge was on drydock when he went to work that day at 3:30 P.M. (R. 241); that he had been working on the forward part of the barge from the time he got to work at 3:30 P.M. until the time this accident happened at 10:15 P.M. (R. 242); and that there were no Union Barge people there but only members of Platzer shipyard (R. 242-243).

Delome also testified that he was supposed to have been fitting a plate on the rake of this barge (R. 243); that he got the plate from Platzer Shipyard (R. 244); that the plate was not cut to the right size so he had to cut it down with a cutting torch (R. 245); *that the plate was a steel plate and they had to use a winch truck to get the plate up to the barge* (R. 245); *that the steel plate was six to eight feet wide and ten to fifteen feet long and 3/8 inches thick* (R. 246); *that it was heavy enough to use a winch truck to pull it up there* (R. 246); that they used comealongs or a hoist to pick it up to the bottom (R. 246); the winch truck was owned by Platzer Shipyard (R. 246-247); that the knuckle which is rounded, is used to cover where the bottom plate of the rake and the side shell of the barge come together (R. 247, 249); that there were two holes in the barge that the men had been able to get in and out of the rake of the barge—one was the knuckle opening where the knuckle had been removed and the other was the opening where the plate was to be fitted in (R. 251-252); *that with these holes in the bottom of the barge, it would have sunk if it had been in the water* (R. 252).

Vernon Paul Delome, the petitioner's first cousin, testified that he was a fitter with Platzer Shipyard in July 1966 (R. 547); that he was working on the same barge

that the petitioner was working on and observed his accident (R. 548); that there were two holes in the front rake of the barge where you could gain entrance to the rake area (R. 553); that he knew of nobody from Union Barge Line there at the time they were working (R. 560); that the only one telling him how to do his work was Mr. Kirby, who was employed by Platzer Shipyard (R. 560-561); and that all of the work was being done on the front end of the barge (R. 569).

Answers to interrogatories propounded to Union Barge and Platzer were introduced into evidence, and established that the barge was completely removed from navigation during the time of repairs (R. 306) although it was not intended that it be permanently removed from navigation (R. 306); that the dimensions of the barge were 175 feet long, 26 feet wide, and 10.8 feet in depth from the hatch coaming down to the bottom of the hole (R. 306); that the barge UBL 550 arrived at Platzer Shipyard on July 22, 1966 and departed the shipyard seven days later on July 29, 1966 (R. 307); that the amount of charges billed for repair work during these dates on the barge UBL 550 was $3,688.76 (R. 307-308); that there were no representatives, officials or employees of Union Barge Line Company at Platzer Shipyard facilities while the barge was at these facilities for repair work (R. 591-592); and that the barge in question was delivered to Platzer under the custody and control of an independent towing firm (R. 627) and the barge was not manned by an employee of Union Barge.

Ronald Roush, port engineer for Union Barge (R. 593), testified that he was familiar with the construction of the barge UBL 550 (R. 594); that Union Barge had fifteen barges constructed in accordance with the blue-

prints identified as Plaintiff's Exhibit #17 (R. 596, Exhibit Vol. 1); that the UBL 550 was an open barge and not designed to carry a crew or have permanent lights installed on it (R. 598); that it did not have any motor power of its own apart from its tug (R. 599); that these barges are not designed to go to sea but are operated exclusively on inland waterways (R. 601-602); that he had experience with the repair and maintenance of Union Barge's vessels (R. 602); and they did not have anything to do with directing the details of the repair work on these barges (R. 602).

The repair invoice (Plaintiff's Exhibit No. 19) indicated that the repairs made on the barge UBL 550 at Platzer Shipyard in July 1966 included cropping and renewing (cutting out and replacing) the damaged bottom and knuckle in the port side of the bow rake; removing and repairing eight bilge brackets, and removing and entirely replacing one bilge bracket, washing and cleaning mud out of the bow rake and air testing the work when it was completed (Record Appendix Exhibit Volume, p. 2).

Van Wagnon, Platzer's superintendent, testified that Platzer Shipyard was located near Green's Bayou in Houston (R. 630); that he was familiar with the marine railway drydock owned by Platzer Shipyard (R. 630-631); that it runs from the water of a slip off Green's Bayou onto the shipyard premises a distance of 280 feet (R. 631); that the lights on the left side of the railway were located about 30 or 40 feet from the front end of the railway and *280 feet of the railway is out of the water* (R. 635); *that if the front of the barge was pretty nearly even with the light, and if the barge were 175 feet long, then the back end of the barge would be on land* (R. 636);

that the front end of the barge would be 240 feet from the water (R. 636) *and if the barge length were 175 feet, the back end of the barge would be some 65 feet from the water* (R. 636-637); that Plaintiff's Exhibit #19 was a copy of the invoice sent to Union Barge of the repairs to the barge UBL 550 (R. 636); that "crop and renew damaged bottom and knuckle in the bow rake port side" on the invoice means to cut out with a cutting torch and replace the bottom and knuckle with a new steel plate (R. 637-638); that you are cutting out and replacing a portion of the steel bottom of the barge (R. 638); that a knuckle is the corner where the side and the bottom plate meet (R. 638); that the frame and bilge brackets are strength members and structural supports of the barge (R. 638-639); that the frames are structural supports on the bottom of the barge (R. 639); that part of their job was to cut out and replace part of the structural frames (R. 639); that the bilge brackets are structural parts of the knuckle (R. 640); that "fair" means to straighten up while "renew" means to replace entirely (R. 641); that these repairs were structural repairs (R. 642); that they had electric welding and acetylene cutting equipment and winch truck or crane to handle the material with at Platzer (R. 642); *that a winch truck or crane is necessary because the steel plate is too big for men to lift* (R. 643); *that to do this work shown on Plaintiff's Exhibit #19 it was necessary to remove the barge from the water and place it in drydock* (R. 643); *that you just couldn't make the repairs in the water* (R. 643); *that they were working on the bottom part of the rake and you had to get it out of the water to do this* (R. 643); *that it would require someone with knowledge of welding, burning and fitting* (R. 644); that to his knowledge there was no one from

Union Barge around supervising any of this repair operation (R. 645); that the structural changes involved on this repair contract just had to do with the damages it had received (R. 651); *that he considered this major repair because he did not believe the barge could be used in this damaged condition* (R. 658).

ARGUMENT

1. Jurisdiction

The burden was upon the petitioner to allege and prove a cause of action within the jurisdiction of the Federal District Court. In this case the petitioner alleged that this was a cause of admiralty and maritime jurisdiction under Rule 9(h).

The Constitution provides that the federal judicial power shall extend to "all cases of admiralty and maritime jurisdiction"[6] but it has been left to Congress and to the Courts to define that phrase. Section 9 of the Judiciary Act of 1789[7] provides that the district courts of the United States shall have original jurisdiction of "any civil case of admiralty or martime jurisdiction."

This Court first enunciated the rule as to admiralty jurisdiction of the federal courts in matters of tort in *The Plymouth*[8] when it stated:

> ". . . The jurisdiction of the admiralty does not depend upon the fact that the injury was inflicted by the vessel, but upon the locality—the high seas, or

6. U. S. Constitution, Art. III, §2.

7. 1 Stat. 76, as amended, 28 U.S.C. §1333.

8. 70 U.S. (3 Wall.) 20, 18 L.Ed. 125 (1866).

> navigable waters where it occurred. Every species of tort, however occurring, and whether on board a vessel or not, if upon the high seas or navigable waters, is of admiralty cognizance."[9]

This rule was reiterated in *Atlantic Transport Co. of West Virginia v. Imbrovek,*[10] where the Supreme Court held that the jurisdiction of the admiralty in torts is indispensably, if not exclusively, dependent upon the locality of the tort. And in *Grant Smith-Porter Ship Company v. Rohde,*[11] the Court announced:

> "The general doctrine that in contract matters admiralty jurisdiction depends upon the nature of the transaction and in tort matters upon the locality, has been so frequently asserted by this court that it must now be treated as settled."[12]

And in construing the locality of the tort, it is not the place where the negligent acts occur but rather where the injury occurs.

Applying these well-established principles of law to the facts of our case here, it is obvious that the district court lacked admiralty or maritime jurisdiction of this case because the locality of the tort here was on land and not on navigable waters. Delome was injured when he tripped and fell near the front end of the barge UBL 550 which was drawn upon a marine railway and located some 240 feet from water's edge. Even the Extension of Ad-

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9. Ibid at 128.

10. 234 U.S. 52, 58 L.Ed. 1208, 34 S.Ct. 733 (1914).

11. 257 U.S. 469, 66 L.Ed. 321, 42 S.Ct. 157 (1922).

12. Ibid at 476.

miralty Jurisdiction Act of 1948[13] does not create jurisdiction in this case because it provides:

> "The admiralty and maritime jurisdiction of the United States shall extend to and include all cases of damage or injury, to person or property, *caused by a vessel on navigable water,* notwithstanding that such damage or injury be done or consummated on land." (Emphasis supplied).

In this case the undisputed evidence was that not only the front end of the barge where the plaintiff was working when he was injured was on land, but *the entire barge was on dry land—in fact, the rear of the barge was some 65 feet from the nearest water* (R. 636-637), as even the petitioner concedes (Petition for Certiorari, p. 6).

It should be further noted that admiralty jurisdiction has not been construed to extend to accidents on piers, jetties, bridges, or even ramps or railways running into the sea.[14]

Therefore, since Delome's injury here neither occurred on navigable water nor was it caused by a vessel on navigable water, applying the indispensable requirement of locality of the tort, there is no admiralty or maritime jurisdiction in this case, and the Fifth Circuit properly reversed the judgment of the District Court for lack of jurisdiction and remanded the cause with directions that it be dismissed without prejudice.

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13. 62 Stat. 496, 46 U.S.C. §740.

14. *Rodrigue v. Aetna Casualty & Surety Company,* 395 U.S. 352, 23 L.Ed.2d 360, 89 S.Ct. 1835 (1969); *Hastings v. Mann,* 4th Cir. 1965, 340 F.2d 910, cert. den. 380 U.S. 963, 14 L.Ed.2d 153, 85 S.Ct. 1106.

2. Unseaworthiness

Union Barge only owed a duty of seaworthiness to the petitioner, Delome, if (1) the barge were in navigation at the time of Delome's accident, and (2) Delome was performing the traditional duties of a seaman. The Court of Appeals correctly held that the members of Delome's crew were not doing the type of work traditionally performed by seamen, and therefore no warranty of seaworthiness was owed to Delome by Union Barge. In addition, though the courts below held otherwise, the barge UBL 550 was clearly not in navigation at the time of Delome's accident.

The best that can be said of the status of Delome here is that from time to time he worked aboard vessels brought into Platzer Shipyard for repairs. There was no evidence that at the time of his accident he was performing the traditional duties of a seaman, and therefore no warranty of seaworthiness was owed to him. As shown by the evidence summarized above, Delome's crew was engaged in repairing damage done to the forward rake of the barge UBL 550 which prevented it from being used in navigation. Delome himself admitted that he was employed to burn, cut and fit a steel plate which was six to eight feet wide and ten to fifteen feet long and was so heavy that it required the use of a winch truck owned by Platzer Shipyard to lift it (R. 243-246). The work was such that the repairs could not be made in the water but rather it was necessary to remove the barge from the water and place it in drydock (R. 643), and it required someone with knowledge of welding, burning and fitting (R. 644). Even Capt. John Vandergrift, the petitioner's "expert witness", admitted that the plates and knuckles could not be taken out and replaced with the barge in

the water (R. 419) and that the crew of a tug does not have welding torches, cutting torches, winches, and that sort of thing to make major repairs or repairs of almost any extent (R. 420).

Therefore, the Court of Appeals was correct when it observed:

> ". . . While the barge was not out of navigation, its flotation capability was, at least, impaired during the repair process. Moreover, cutting a large, heavy plate out of the forward rake and inserting a new one required special equipment, including a winch truck and crane, not normally categorized as appurtenant to the vessel. Finally, whatever Delome's particular function may have been, his crew was engaged in a specialized task demanding training and skills not customarily found among seamen. To summarize, the repairs undertaken were not such as could have been performed in the ordinary course of business in the shipping industry. They could have been accomplished only on a drydocked vessel, with special equipment, and by a trained crew of shipfitters, not seamen. . . ."[15]

Contrary to petitioner's contention that the Court's opinion in this case "flies smack in the face of *Sieracki*,"[16] it should be noted that the petitioner here was *not* a longshoreman but was a shorebased shipyard worker (a distinction of considerable importance) and the Fifth Circuit in this case was clearly following the precedent first established by this Court in *United N. Y. & N. J. Sandy Hook Pilots Ass'n v. Halecki*,[17] a case which petitioner pointedly

15. 444 F.2d 225, 232.

16. Petition for Certiorari, p. 11.

17. 358 U.S. 613, 3 L.Ed.2d 541, 79 S.Ct. 517 (1959).

ignores in his petition. Further, though the Fifth Circuit has adopted this same line of reasoning in similar cases involving shorebased workers, e.g., *Drake v. E. I. duPont de Nemours & Co.*,[18] and *Johnson v. Oil Transport Company*,[19] it has also been consistent with the decisions of the Fourth Circuit in *McCown v. Humble Oil & Refining Company*,[20] and the Second Circuit in *Lyon v. United States*.[21] In the *Lyon* case, the district court found that a shipfitter who was injured when he slipped and fell while working aboard a ship undergoing repairs and alterations was not entitled to the warranty of seaworthiness because "his occupation was not that of a seaman either in fact or in judicial theory." This holding was affirmed by the Second Circuit Court of Appeals in a *per curiam* opinion where it noted:

> "The District Court rightly held that the libelant, an employee of the impleaded contractor, was entitled to no warranty of seaworthiness. He was engaged in a type of work not 'traditionally done by seamen.' United New York and New Jersey Sandy Hook Pilots Ass'n v. Halecki, 79 S.Ct. 517, 519."[22]

And petitioner's argument that ship repairmen now "use modern equipment of the type that was not available to the seamen who formerly performed this work"[23] is the same argument that was urged and rejected in *McCown*

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18. 432 F.2d 276 (1970).
19. 440 F.2d 109 (1971).
20. 405 F.2d 596 (1969).
21. 265 F.2d 219 (1959).
22. Ibid at 220.
23. Petition for Certiorari, p. 13.

v. Humble Oil & Refining Company, supra,—under the evidence in this case the work was such that the repairs could not be made in the water but rather it was necessary to remove the barge from the water and place it in drydock (R. 643), and it required someone with special skills and knowledge of welding, burning and fitting (R. 644), and special equipment, including welding torches, cutting torches and winch trucks that were not connected with a tug or barge's seagoing operations (R. 420).

Therefore, it is submitted that the petitioner here, who was working as a shipfitter for Platzer Shipyard doing extensive repairs to the damaged bottom and forward rake of the barge UBL 550, which required that it be taken completely out of the water and drydocked, was not doing work traditionally done by seamen, and therefore no warranty of seaworthiness was owed to him.

There is still another reason why the warranty of seaworthiness was not owed to Delome by Union Barge: the barge UBL 550 had been temporarily withdrawn from navigation.

The uncontradicted testimony in this case established that the barge UBL was an unmanned, unpowered barge primarily motivated by a tug either pushing or pulling the barge (R. 598-599; 406-407; 412); that the barge had been drawn up completely out of the water on a marine railway and was entirely on land (R. 241; 636-637); that the shipyard day crew had cut out the bottom of the barge and cut out a knuckle, so that there was a hole in the bottom of the rake and also where the knuckle was out (R. 157-158); that the openings were large enough to be used for ingress and egress by the men as they worked

(R. 160; 251-252); that with these holes in the bottom of the barge, it would have sunk if it had been in the water (R. 252); that part of the work of the shipyard crew was to cut down a steel plate to fit the rake of the barge, and that the steel plate was so large (six to eight feet wide and ten to fifteen feet long) and so heavy that it required the use of a winch truck owned by Platzer Shipyard to pull it up there (R. 246); and that the crew of a tug could not replace the knuckles or do underwater repairs to the bottom of the barge (R. 420; 643-644). Further, it was undisputed that complete care, custody and control of the barge had been turned over to Platzer Shipyard and there were no representatives, officials or employees of Union Barge at Platzer Shipyard while the barge was undergoing the repair work (R. 591-592; 602; 645).

The leading case on this point is *West v. United States.*[24] There the Supreme Court held that a shipowner owed no duty of seaworthiness to a shipyard employee who was injured while repairing a ship where the vessel involved had been turned over to an independent contractor for repairs to make her seaworthy, equivalent to home port structural repairs, and the ship was not in the hands and under the control of the shipowner at the time of the plaintiff's accident.

The principles enunciated in the *West* case have been followed by the various Circuit Courts in *Union Carbide Corp. v. Goett*,[25] *Van Horn v. Gulf Atlantic Towing Corp.*,[26] and in two very recent cases almost identical on

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24. 361 U.S. 118, 4 L.Ed.2d 161, 80 S.Ct. 189 (1959).

25. 256 F.2d 449, 278 F.2d 319, cert. den. 364 U.S. 826, 5 L.Ed. 2d 55, 81 S.Ct. 64 (1960).

26. 388 F.2d 636 (4th Cir. 1968).

their facts to the instant case: *Moye v. Sioux City & New Orleans Barge Lines, Inc.*,[27] and *Parker v. Cargill.*[28]

In *Moye* the plaintiff was a shipyard worker who sought damages against the owner of a grain barge for injuries sustained in the course of his employment aboard the barge while it was undergoing repairs in Saucer's floating drydock. The barge was unmanned and had no motive power or lights, just as in the barge in the instant case. As a result of two collisions, the barge was in need of repairs to the side and deck plates, as well as to some plates in the hopper, but the repairs were not major repairs or structural changes, and only took several days to complete. After the barge had been delivered to Saucer Shipyard, the bargeowner had no employees or representatives present at the shipyard, just as in our case here. The plaintiff was injured about 10:00 P.M. when he fell through a partially open hatch cover into the hopper, due in part to inadequate illumination. In affirming the district court's finding that there was no warranty of seaworthiness owed by the bargeowner to the shipyard employee, the Fifth Circuit observed:

> "In this case there were no major repairs or structural changes made in the barge although the collision damage required the renewal of side plating in two places, the renewal of some deck plating and the reworking of Nos. 4 and 5 roller hatch covers. This work required the barge to be drydocked by Saucer who, from the time it received the barge until the work was completed, had exclusive control of the

27. 402 F.2d 238 (5th Cir. 1968), cert. den. 395 U.S. 913, 23 L.Ed.2d 226, 89 S.Ct. 1759.

28. 417 F.2d 772 (5th Cir. 1969), cert. den. 397 U.S. 973, 25 L.Ed.2d 267, 90 S.Ct. 1089.

> barge and the lighting under which the repairs were effected. The barge was designed to carry no motive power, lights or crew. Sioux City had no representative or crew aboard at any time while the barge was in Saucer's yard. Under these circumstances we hold that there was no warranty of seaworthiness by the ship owner running in favor of shore-based workers on the vessel."[29]

One year later, in *Parker v. Cargill, supra,* the Fifth Circuit was confronted with an identical fact situation—a shipyard worker who was injured while working aboard an unmanned barge undergoing repairs on a floating drydock on navigable water in the Mississippi River with the shipyard having exclusive custody and control of the barge and the repairs. The Fifth Circuit, in affirming the judgment of the trial court without even bothering to hear oral argument, wrote a *per curiam* opinion holding that the case was indistinguishable from *Moye v. Sioux City, supra,* and that no warranty of seaworthiness was owed to the plaintiff because the barge was temporarily withdrawn from navigation.

Since the facts of our case are indistinguishable from the *Moye* and *Parker* cases, it is submitted that Union Barge owed no duty or warranty of seaworthiness to Delome because the barge UBL 550 had been temporarily withdrawn from navigation at the time of Delome's accident.

3. Negligence

Although the Court of Appeals correctly reversed the trial court's findings on negligence against Union Barge

29. 402 F.2d 238, 240.

for lack of admiralty or maritime jurisdiction, the findings of negligence against Union Barge could not stand in any event. The trial court in this case found that Union Barge was negligent in failing to provide Delome with a reasonably safe place to work, to-wit: with an adequate hatch coaming of sufficient height and with a walkway unobstructed by brackets, timberheads and raised pumpwell cover, and that such negligence was a proximate cause of Delome's injuries and damages. However, since Union Barge had turned over complete custody and control of the barge UBL 550 to Platzer for repairs, and exercised no direction or supervision over the repair work, and since Delome was injured because he was partially blinded by a shipyard light positioned onshore and tripped over an unknown object while walking down the walkway on the portside of the barge, it seems clear that Union Barge breached no duty of care toward Delome.

As the Court of Appeals observed in *Moye v. Sioux City & New Orleans Barge Lines, Inc., supra:*

> "Upon the complete surrender of control of the barge by Sioux City to Saucer for repairs, there was no duty owed by Sioux City to protect Moye from risks inherent in carrying out the contract. Therefore Moye's claim of negligence in failing to provide him with a safe place to work must also fail. West v. United States, supra."[30]

In *West v. United States,* this Court held that a shipowner owed no duty to exercise reasonable care to furnish a safe place to work where the shipowner had no control over the vessel, or power either to supervise or control

30. 402 F.2d 238, 241.

the repair work in which the injured shipyard employee was engaged.

The only possible exception to this rule would be for a hidden or latent defect, which might make the shipowner guilty of negligence even though he had no control of the repairs. However, this exception is not applicable here because neither the hatch coaming nor the walkway were hidden or latent. In fact, Delome was fully aware of both the size of the hatch coaming and the walkway since he readily identified the photographs (Plaintiff's Exhibit Nos. 1-4, Record Exhibit Volume 3-5) as representing the same type of walkway and hatch coaming *as he remembered it* that was on the barge that day that he fell into the hold (R. 109-110); that he estimated the hatch coaming to be about 18 inches in height (R. 127, 258); and he knew the walkway was about 18 to 20 inches wide (R. 171, 272). Therefore, the nature, size and condition of the hatch coaming and walkway were not hidden or latent insofar as Delome was concerned.

Thus, it seems clear that Delome was not injured as a result of any negligence or breach of duty owed to him by Union Barge but rather his injury occurred as a result of his own negligence (as the trial court found), coupled with an unsafe condition or risk created by the repair work being performed by Platzer.

CONCLUSION

There are no special and important reasons for granting writ of certiorari in this case. The opinion of the Court below on the question of admiralty jurisdiction in matters of tort is harmonious and in no way in conflict with this Court's decisions from the time of *The Plymouth* to the present time. Likewise, the opinion of the Court below

on the question of whether the petitioner, a shorebased shipyard worker, was performing the traditional work of a seaman so as to be entitled to the warranty of seaworthiness is consistent with this Court's opinion in *Halecki* and its progeny. Further, this case is not significant beyond the parties and was correctly decided below under the particular facts and evidence presented on the trial of this case.

Respondent, Platzer Shipyard, Inc., therefore prays that the Petition for Certiorari be in all things denied.

Respectfully submitted,

MEHAFFY, WEBER, KEITH
& GONSOULIN
1400 San Jacinto Building
Beaumont, Texas 77701

Attorneys for Respondent
Platzer Shipyard, Inc.

By_____
DEWEY J. GONSOULIN,
Of Counsel.

CERTIFICATE OF SERVICE

I hereby certify that two copies of the foregoing Reply to Petition for Writ of Certiorari have been furnished to the attorneys for the Petitioner and the attorneys for the Respondent, Union Barge Line Company, on this 26th day of October, 1971.

_____
DEWEY J. GONSOULIN

APPENDIX

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 31037

C. J. PAUL DELOME, Plaintiff-Appellee,

versus

UNION BARGE LINE COMPANY, ET AL., Defendants-Third Party Plaintiffs-Appellants-Cross Appellee,

versus

PLATZER SHIPYARD, INC., Third Party Defendant-Appellee-Cross Appellant.

Appeal from the United States District Court for the Eastern District of Texas

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(June 8, 1971)

Before O'SULLIVAN,* THORNBERRY and DYER, Circuit Judges.

DYER, Circuit Judge: Union Barge Line Company and Platzer Shipyard, Inc., appeal from the District Court's judgment for Delome, a shipfitter injured on the Barge

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* Senior Circuit Judge, 6th Circuit, sitting by designation.

UBL 550 while it rested on a marine railway. Appellants contend that the trial court had no admiralty and maritime jurisdiction over this controversy, that the court's conclusions concerning the unseaworthiness of the barge and the negligence of Union were erroneous, and that the damages assessed were excessive. We vacate with directions.

An open-hopper cargo barge, the UBL 550 had no motive power and carried no crew. On its port and starboard decks were walkways twenty inches wide. Coamings 3 5/16 inches high separated these walkways from the open cargo hatch. On the port side of the vessel, brackets extended into the walkway from the hatch coaming. Bitts (commonly known as timberheads) approximately nine inches high, as well as a circular pumpwell cover, were located in the same walkway.

On July 22, 1966, the UBL 550 was delivered to Platzer's repair facility in Green Bayou, Texas, for repairs to its forward rake area. Two days later the barge was placed on a marine railway and moved out of the water so that workmen could take a damaged plate from the forward rake and reseal the opening. During the evening shift on July 25, a foreman ordered Delome, one of the workers, to go onto the barge and enter the forward rake space through a hatchway. To facilitate ingress and egress, Platzer had placed a ladder twenty feet from the forward bulkhead on the port side. Employees such as Delome used this ladder to climb aboard.

Following his instructions, Delome reached the port walkway. As he started forward, he was temporarily blinded by the glare of a 1000-watt onshore light located on a pole near the vessel's bow. After taking a few steps in this dazzled condition, Delome fell ten feet into the open cargo hold.

Delome collected under the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C.A. §§ 901-950, then initiated this action against Union Barge Line Co. pursuant to Rule 9(h) of the Federal Rules of Civil Procedure.[1] Subsequently Union impleaded Platzer—the third party complaint alleging that Platzer's negligence and breach of its duty of workmanlike performance proximately caused Delome's injury. According to the record, no party objected to the District Court's assumption of admiralty jurisdiction.

Sitting without a jury, the District Judge heard the evidence and concluded that, at the time of Delome's accident, the UBL 550 was a vessel in navigation; that Union owed a warranty of seaworthiness to Delome because he "was performing the traditional duties of a seaman in making minor repairs as a shipfitter;" and that Union had breached this warranty by providing an unseaworthy walkway, filled with trip hazards which circumscribed a hatch coaming insufficient in height. The court held that these breaches were causally related to Delome's fall. Furthermore, the court decided that Union was negligent in furnishing Delome with an unsafe place to work; it held that such negligence was a proximate cause of Delome's injuries. The court also determined that Platzer was negligent in failing to install a guard rail around the open

1. Rule 9 provides in pertinent part:

(h) Admiralty and Maritime Claims. A pleading or count setting forth a claim for relief within the admiralty and maritime jurisdiction that is also within the jurisdiction of the district court on some other ground may contain a statement identifying the claim as an admiralty or maritime claim for the purposes of Rules 14(c), 38(e), 82, and the Supplemental Rules for Certain Admiralty and Maritime Claims. If the claim is cognizable only in admiralty, it is an admiralty or maritime claim for these purposes whether so identified or not.

hopper cargo area and in positioning its onshore light. Concluding that Platzer's negligence proximately caused Delome's injuries and constituted a breach of the duty of workmanlike performance owed to Union, the District Court held that Platzer was obligated to indemnify Union for all sums recovered by Delome as a result of the accident. Finally, the court found Delome 5% contributorily negligent and diminished his recovery by that percentage. It awarded damages of $213,437.69 together with interest at 6% per annum.

Both Union and Platzer have appealed. They question the District Court's assumption of admiralty jurisdiction and attack the court's conclusions with respect to the warranty of seaworthiness and duty to provide a safe place to work. They also assert that the damages assessed by the court were excessive.

ADMIRALTY JURISDICTION

A. *The Navigable Waters Test*

When Delome fell, the UBL 550 was located on a marine railway. Its stern was approximately sixty-five feet inland. In fact, no part of the barge was on, or even over, navigable water. Consequently the Admiralty Extension Act[2] is inapplicable.

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2. 46 U.S.C.A. § 740. The Extension Act provides in pertinent part:

> The admiralty and maritime jurisdiction of the United States shall extend to and include all cases of damage or injury, to person or property, caused by a vessel on navigable water, notwithstanding that such damage or injury be done or consummated on land.
>
> In any such case suit may be brought in rem or in personam according to the principles of law and the rules of practice obtaining in cases where the injury or damage has been done and consummated on navigable water. . . .

Postulating that breach of the warranty of seaworthiness is a maritime tort, Union and Platzer argue that Delome's "unseaworthiness" claim was not within the District Court's "admiralty and maritime jurisdiction" as articulated by the Constitution,[3] and defined by Congress[4] and the federal courts.[5] The vessel, the accident, and the injury were too remote from the water's edge, the traditional boundary of admiralty tort jurisdiction. Thus framed, the issue is simple, if somewhat wordy: whether the shoreward sweep of the silver oar encompasses a shipyard worker's suit against a vessel owner when the complaint alleges that the worker is a *Sieracki*[6] seaman injured because of the

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3. U. S. Const. art. III, § 2.

4. *E.g.*, Jones Act, 46 U.S.C.A. § 688; Admiralty Extension Act, 46 U.S.C.A. § 740. Ostensibly there are limits to the congressional power. *See, e.g., O'Donnell v. Great Lakes Dredge & Dock Co.*, 1943, 318 U.S. 36, 42-43; *The Blackheath*, 1904, 195 U.S. 361, 368-69 (Brown, J., concurring); *The Lottawanna*, 1874, 88 U.S. (21 Wall.) 558, 577; *The Belfast*, 1868, 74 U.S. (7 Wall.) 624, 640-41; *Gebhard v. S.S. Hawaiian Legislator*, 9 Cir. 1970, 425 F.2d 1303, 1316 (Wright, J., dissenting in part). *See also* Black, "Admiralty Jurisdiction: Critique and Suggestions," 50 *Colum. L. Rev.* 259 (1950); Maraist, "Proposed Discipline for a Procedural Problem Child: Reallocation of Admiralty Tort and Compensation Jurisdiction Between Federal and State Courts," 24 *U. Miami L. Rev.* 26 (1969); Morrison, "The Remedial Powers of the Admiralty," 43 *Yale L.J.* 1 (1933); Tetreault, "Seamen, Seaworthiness, and the Rights of Harbor Workers," 39 *Cornell L.Q.*, 381 (1954).

5. Judicial applications of the rules delineated by *The Plymouth*, 1865, 70 U.S. (3 Wall.) 20, 35-36, *The Osceola*, 1903, 189 U.S. 158, 171, 175, and their progeny have evoked perceptive critical comment in a number of publications. *E.g.*, Tetreault, "Seamen, Seaworthiness, and the Rights of Harbor Workers," 39 *Cornell L.Q.* 381 (1954); Note, "Risk Distribution and Seaworthiness," 75 *Yale L.J.* 1174 (1966); Comment, "Seamen and the Warranty of Seaworthiness in Maritime Injuries—Sieracki Today," 34 *Tulane L.Rev.* 572 (1960); Comment, "A New Look at the Unseaworthiness Doctrine: The *Roper* Case," 29 *U.Chi. L.Rev.* 519 (1962).

6. *Seas Shipping Co. v. Sieracki*, 1946, 328 U.S. 85.

vessel's unseaworthiness, if the vessel is located on a marine railway outside navigable water.

Born of dicta[7] and nurtured by fiction,[8] the shipowner's warranty of seaworthiness in personal injury cases is now firmly rooted in federal maritime law.[9] For years this warranty was considered contractual in nature. *E. g., The Osceola*, 1903, 189 U.S. 158, 171-75; *Hamilton v. United States*, 4 Cir. 1920, 268 Fed. 15, 21, *cert. denied*, 254 U.S. 645; *Rainey v. New York & P. S.S. Co.*, 9 Cir. 1914, 216 Fed. 449, 453, *cert. denied*, 235 U.S. 704; *see Seas Shipping Co. v. Sieracki*, 1946, 328 U.S. 85, 90. Recently, however, some courts have articulated the thesis that breach of the warranty is tortious. *E.g., Gebhard v. S.S. Hawaiian Legislator*, 9 Cir. 1970, 425 F.2d 1303, 1310; *Strika v. Netherlands Ministry of Traffic*, 2 Cir. 1950, 185 F.2d 555, 558, *cert. denied*, 1951, 341 U.S. 904; *The Chiswick*, 5 Cir. 1916, 231 Fed. 452, *cert. denied*, 241 U.S. 673; *see Gutierrez v. Waterman Steamship Corp.*, 1963, 373 U.S. 206, 214-15. Nevertheless, given their factual contexts, the latter expressions must be regarded as dicta: in each case the vessel was moored on navigable waters and the causes were, at least, within the purview of the Extension Act. *See, e.g., Strika v. Netherlands Ministry of Traffic, supra* at 556. Indeed, we have found no case in which a definition of the intrinsic nature of the

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7. *The Osceola*, 1903, 189 U.S. 158, 175; *see United New York & New Jersey Sandy Hook Pilots Association v. Halecki*, 1959, 358 U.S. 613, 616.

8. *Latus v. United States*, 2 Cir. 1960, 277 F.2d 264, 267, *cert. denied*, 364 U.S. 827. *See also* Tetreault, "Seamen, Seaworthiness, and the Rights of Harbor Workers," 39 *Cornell L.Q.* 381 (1954).

9. *See generally* Bue, "Admiralty Law in the Fifth Circuit—A Compendium for Practitioners: I," 4 *Hous. L.Rev.* 350, 392-408 (1966) (pre-1966 judicial development).

warranty of seaworthiness was necessary for determination of a federal court's admiralty jurisdiction.

The warranty of seaworthiness in personal injury cases essentially depends on neither common-law tort nor contract concepts. *Dimas v. Lehigh Valley R.R.*, 2 Cir. 1956, 234 F.2d 151, 153. Instead, while the seaworthiness doctrine is comprised of both tort and contract elements, it is a creature of twentieth-century judicial policy concerning risk distribution in the shipping industry. In *Seas Shipping Co. v. Sieracki, supra,* the Supreme Court explicated this basis for the doctrine. It stated:

> Obviously the norm of the liability has been historically and still is the case of the seaman under contract with the vessel's owner. This is because the work of maritime service has been done largely by such persons. . . .
>
> . . .
>
> Because rationalizing the liability as one attached by law to the relation of shipowner and seaman, where this results from contract, may have been thought useful to negative the importation of those common-law tort limitations does not mean, however, that the liability is itself contractual or that it may not extend to situations where the ship's work is done by others not in such an immediate relation of employment to the owner. That the liability may not be either so founded or so limited would seem indicated by the stress the cases uniformly place on its relation, both in character and in scope, to the hazards of marine service which unseaworthiness places on the men who perform it. . . . Those risks are avoidable by the owner to the extent that they may result from negligence. And beyond this he is in position, as the worker is not, to distribute the loss in the shipping community which receives the service and should bear its cost.

> These and other considerations arising from the hazards which maritime service places upon the men who perform it, rather than any consensual basis of responsibility, have been the paramount influences dictating the shipowner's liability for unseaworthiness as well as its absolute character. It is essentially a species of liability without fault, analogous to other well known instances in our law. Derived from and shaped to meet the hazards which performing the service imposes, the liability is neither limited by conceptions of negligence nor contractual in character . . . it is a form of absolute duty owing to all within the range of its humanitarian policy.

328 U.S. at 90-95 (footnotes omitted) (citations omitted). This warranty does not apply solely to vessels plying their trade on the high seas; it does not necessarily terminate, or become suspended, when ships reach calm waters or safe harbors. The warranty contemplates not only the turbulence of the oceans but also the conditions peculiar to ships, where space and equipment must be utilized carefully to minimize accident-inducing hazards. While the vessel owner's warranty does not mean that he has eradicated all risks or that his ship can weather all storms, it does indicate that the vessel is reasonably fit for the intended use. *See Boudoin v. Lykes Brothers Steamship Co.*, 1955, 348 U.S. 336, 339. It is both absolute and nondelegable. *United New York & New Jersey Sandy Hook Pilots Association v. Halecki,* 1959, 358 U.S. 613, 616-17; *see Carlisle Packing Co. v. Sandanger,* 1922, 259 U.S. 255, 259. Recently the Court added:

> A major burden of the Court's decisions spelling out the nature and scope of the cause of action for unseaworthiness has been insistence upon the point that it is a remedy separate from, independent of, and

> additional to other claims against the shipowner, whether created by statute or under general maritime law. More specifically, the Court has repeatedly taken pains to point out that liability based on unseaworthiness is wholly distinct from liability based upon negligence. The reason, of course, is that unseaworthiness is a *condition,* and how that condition came into being—whether by negligence or otherwise—is quite irrelevant to the owner's liability for personal injuries resulting from it.

Usner v. Luckenbach Overseas Corp., 1971, 400 U.S. 494, 498; *see Aguirre v. Citizens Casualty Co.,* 5 Cir. 1971, 441 F.2d 141, 144.

To hold, then, that this uniquely maritime cause of action is circumscribed by the same admiralty jurisdictional boundaries as common-law "land" torts would contravene the risk distribution policy underlying the doctrine as well as common sense. *Cf O'Donnell v. Great Lakes Dredge & Dock Co.,* 1943, 318 U.S. 36, 42-43. In reason and in practice, federal jurisdiction to consider alleged breaches of the shipowner's warranty to furnish a seaworthy vessel cannot depend on such gossamer classification. In another context Mr. Justice Halan has said:

> The confidence of people in their ability to predict the legal consequences of their actions is vitally necessary to facilitate the planning of primary activity and to encourage the settlement of disputes without resort to the courts. However, that confidence is threatened least by the announcement of a new remedial rule to effectuate well-established primary rules of behavior. There is no question in this case of any change in the duties owed by shipowners to those who work aboard their vessels. Shipowners well understand that breach of the duty to provide a seaworthy ship may

> subject them to liability for injury regardless of where it occurs, and for death occurring on the high seas or in the territorial waters of most States. It can hardly be said that shipowners have molded their conduct around the possibility that in a few special circumstances they may escape liability for such a breach. Rather, the established expectations of both those who own ships and those who work on them are that there is a duty to make the ship seaworthy and that a breach of that federally imposed duty will generally provide a basis for recovery. It is the exceptional denial of recovery that disturbs these expectations.

Moragne v. States Marine Lines, Inc., 1970, 398 U.S. 375, 403-04. Justice Harlan's scholarly opinion articulates our thoughts here. That a vessel is drydocked does not necessarily mean that no warranty of seaworthiness is owed. *See, e.g., Johnson v. Oil Transport Co.*, 5 Cir. 1971, 440 F.2d 109, 115 [No. 28418, Mar. 12, 1971]; *Moye v. Sioux City & New Orleans Barge Lines, Inc.*, 5 Cir. 1968, 402 F.2d 238, *cert. denied*, 1969, 395 U.S. 913; *Rogers v. M/V Ralph Bollinger*, E.D. La. 1968, 279 F.Supp. 92, 95; *Allen v. Union Barge Line Corp.*, E.D. La. 1965, 239 F.Supp. 1004, 1008, *aff'd*, 5 Cir. 1966, 361 F.2d 217, *cert. denied*, 1967, 385 U.S. 1006. Nor does the fact that the ship is temporarily out of the water necessarily defeat federal jurisdiction with regard to causes involving possible breaches of the claimed warranty. Instead, as the cases illustrate, the warranty's existence and federal jurisdiction to consider alleged breaches depend on conceptual considerations, such as status, discussed *infra*. The "*in* navigable waters" spatial limitation is not determinative. It follows that any jurisdictional dichotomy between marine railways and other

types of drydocks[10] regarding the warranty of seaworthiness would be a fictional artifice, contrived to ensure conformity to a spatial boundary which is not really pertinent. To abjure federal jurisdiction over this maritime doctrine on the basis of the navigable waters criterion would exemplify "the exceptional denial of recovery that disturbs" the established expectations of both those who own ships and those who work on them. It can hardly be said that shipowners have molded their conduct around the possibility that by placing their vessels on marine railways rather than in some other type of drydock, they may escape liability for breaches of the warranty of seaworthiness. The distinction would be as difficult to sustain rationally as that found wanting in *Moragne*. Consequently we hold that the navigable waters, or locality, test is inapplicable to an unseaworthiness claim demanding damages as a result of personal injuries occurring aboard a vessel on a marine railway.

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10. For purposes of the Longshoremen's and Harbor Workers' Compensation Act, marine railways have been identified as drydocks. *Holland v. Harrison Brothers Dry Dock & Repair Yard, Inc.*, 5 Cir. 1962, 306 F.2d 369, 372-73; *Avondale Marine Ways, Inc. v. Henderson*, 5 Cir. 1953, 201 F.2d 437, 438, *aff'd*, 346 U.S. 366; *Continental Casualty Co. v. Lawson*, 5 Cir. 1933, 64 F.2d 802, 804-05. That the test is functional—coverage under the Act being dependent on the type of work for which the facility was intended—is manifested by the fact that accidents on other types of docks have been considered outside the Act's scope. *See Nacireme Operating Co. v. Johnson*, 1969, 396 U.S. 212, 217 n. 10, 222-23; *Travelers Insurance Co. v. Shea*, 5 Cir. 1967, 382 F.2d 344, 346-47, *cert. denied*, 389 U.S. 1050; *O'Leary v. Puget Sound Bridge & Dry Dock Co.*, 9 Cir. 1965, 349 F.2d 571; *American Mutual Liability Insurance Co. v. Neumann*, S.D. Ala. 1969, 1970 A.M.C. 466. *But See* Note, "Dockside Injuries Under the Longshoremen's and Harbor Workers' Compensation Act," 3 *Ga. L.Rev.* 622 (1969).

B. *The "Status" Touchstone*

To determine whether a warranty of seaworthiness is owed shoreside workers, examination of three status-oriented factors becomes essential. We focus on "the status of the ship, the pattern of the repairs, and the extensive nature of the work contracted to be done, rather than the specific type of work that each of the numerous shore-based workmen is doing on shipboard at the moment of injury." *West v. United States*, 1959, 361 U.S. 118, 122; *accord, Watz v. Zapata Off-Shore Co.*, 5 Cir. 1970, 431 F.2d 100, 108; *Moye v. Sioux City & New Orleans Barge Lines, Inc., supra* at 240.

Concerning the status of the ship, clearly even a dry-docked vessel may be subject to the warranty of seaworthiness if it is in navigation—*i.e.*, "engaged as an instrument of commerce and transportation on navigable waters." *Rogers v. M/V Ralph Bollinger, supra* at 94-95; *see Hilton v. Aegean Steamship Co.*, D. Ore. 1965, 239 F. Supp. 268. After an extensive discussion of this subject, this Court concluded that a precise definition of the phrase "in navigation" is impossible. *Johnson v. Oil Transport Co., supra* at 115. Indeed, the navigational status of the vessel ordinarily remains a question of fact. *Roper v. United States*, 1961, 368 U.S. 20, 22-23. Nevertheless, a vessel which temporarily leaves commerce, enters a shipyard for minor repairs, and thereupon returns to commerce remains in navigation for purposes of the warranty. *See Drake v. E. I. DuPont deNemours & Co.*, 5 Cir. 1970, 432 F.2d 276, 277-78; *Martin v. Jones*, E.D. La. 1968, 296 F. Supp. 878, 881; *Rogers v. M/V Ralph Bollinger, supra; Allen v. Union Barge Line Corp., supra* at 1007; *Hilton v. Aegean Steamship Co., supra.*

Concerning the pattern of repairs, the limiting factor is tradition: it "requires that the injured shorebased worker be engaged in work traditionally that of a seaman. . . . excluding those persons performing such tasks as making major repairs requiring drydocking or special skills." *Atkins v. Greenville Shipbuilding Corp.*, 5 Cir. 1969, 411 F.2d 279, 282, *cert. denied*, 396 U.S. 846; *see Drake v. E. I. DuPont deNemours & Co.*, *supra* at 278. Moreover, "[t]he inquiry is not who best can bear the risk, but whether the repair *project*—not the specific task—is one that 'seamen' historically have performed." *Watz v. Zapata Off-Shore Co.*, *supra*, 431 F.2d at 107.

Concerning the extensive nature of the work contracted to be done, little need be said; for this criterion is intertwined with the "in navigation" requirement discussed previously. Generally "dead" ships, those withdrawn from navigation and undergoing major repairs, are not subject to the warranty of seaworthiness. *West v. United States*, *supra* at 122; *Johnson v. Oil Transport Co.*, *supra* at 112; *Baum v. United States*, 5 Cir. 1970, 427 F.2d 215, 217; *Stark v. United States*, 5 Cir. 1969, 413 F.2d 253; *Van Horn v. Gulf Atlantic Towing Corp.*, 4 Cir. 1968, 388 F.2d 636, 638; *Latus v. United States*, 2 Cir. 1960, 277 F.2d 264, 266, *cert. denied*, 364 U.S. 827; *Union Carbide Corp. v. Goett*, 4 Cir. 1958, 256 F.2d 449, 455, *rev'd on other grounds*, 1959, 361 U.S. 340; *Guenard v. United States*, E.D. La. 1968, 278 F.2d 310. Conversely, as noted earlier, vessels undergoing minor repairs remain subject to the warranty.

Applying these variables in the factual context *sub judice*, it is clear that the UBL 550 was a vessel in navigation undergoing minor repairs at the time of Delome's

injury. The barge remained at the shipyard for seven days, of which three were spent in making repairs costing only $3688.76. However, it is equally clear that the members of Delome's crew were not doing the type of work traditionally performed by seamen. The record discloses that the UBL 550 entered Platzer's shipyard for minor structural repairs which necessitated drydocking the vessel. While the barge was not out of navigation, its flotation capability was, at least, impaired during the repair process. Moreover, cutting a large, heavy plate out of the forward rake and inserting a new one required special equipment, including a winch truck and crane, not normally categorized as appurtenant to the vessel. Finally, whatever Delome's particular function may have been, his crew was engaged in a specialized task demanding training and skills not customarily found among seamen. To summarize, the repairs undertaken were not such as could have been performed in the ordinary course of business in the shipping industry: They could have been accomplished only on a drydocked vessel, with special equipment, and by a trained crew of shipfitters, not seamen. Manifestly, then, the District Court's finding with respect to the type of work in which Delome and the other members of his crew were engaged was clearly erroneous. Therefore, Union owed Delome no warranty of seaworthiness since he was not even a *Sieracki* or *Hawn*[11] "seaman."

Neither the navigable waters criterion nor the Extension Act encompasses Delome's negligence claim against Union. Certainly our disapprobation of the navigable waters limitation in unseaworthiness cases does not preclude its application in a common-law tort action. *See, e.g., Watz v. Zapata Off-Shore Co., supra* at 110. As we have said,

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11. Pope & Talbot, Inc. v. Hawn, 1953, 346 U.S. 406.

Union owed Delome no warranty of seaworthiness. Furthermore, undisputably the UBL 550 was inland, removed from navigable waters, at the time of Delome's accident. Consequently the District Court had no admiralty jurisdiction over the common-law negligence claim.

DIVERSITY JURISDICTION

Delome invoked, and the District Court assumed, admiralty jurisdiction under Rule 9(h) of the Federal Rules of Civil Procedure. Although we have held that the court had no admiralty jurisdiction, the court might have considered the negligence allegations—that Union had failed to provide Delome's crew with a reasonably safe place to work—under diversity principles. *See* 28 U.S.C.A. §1332. To determine whether such jurisdiction exists, we have reviewed Delome's complaint, as well as relevant portions of the trial transcript.

After averring that the case was within the admiralty and maritime jurisdiction, Delome noted in his complaint that he "is a resident of Orange County, Texas." Furthermore, he alleged:

> Defendant Union Barge Line Company is a foreign corporation or foreign business organization and the address of its home office is Dravo Bldg., 5th and Liberty Streets, Pittsburg 22, Pennsylvania; such Defendant does business in the State of Texas from time to time and the cause of action asserted herein arose in the State of Texas; that such Defendant does not maintain a regular office in the State of Texas nor has it designated an agent for service of process and therefore its agent for service of process is the Secretary of State of the State of Texas under the provisions of Article 2031-b of the Texas Civil Statutes.

Examination of the complaint reveals two facts: First, Delome stated these allegations to obtain service of process under article 2031b, a long-arm statute, rather than to show diversity of citizenship. Second, Delome's allegations are insufficient to confer federal jurisdiction under 28 U.S.C.A. § 1332. Standing alone, an allegation that a party is a resident of a certain state is not a sufficient allegation of his citizenship in that state. *Pattiz v. Schwartz,* 8 Cir. 1968, 386 F.2d 300, 301; *CORE v. Clemmons,* 5 Cir. 1963, 323 F.2d 54, 58, *cert. denied,* 1964, 375 U.S. 992; *Texaco-Cities Service Pipe Line Co. v. Aetna Casualty & Surety Co.,* 8 Cir. 1960, 283 F.2d 144, 145; *Gorman v. King,* E.D. Wis. 1970, 50 F.R.D. 195, 197. *See generally* 5 C. Wright & A. Miller, *Federal Practice and Procedure* § 1208 (1969). Moreover, an allegation that a corporation's home office is located in a certain state is not equivalent to a declaration that its principal place of business is situated in that state. *See, e.g., Anniston Soil Pipe Co. v. Central Foundry Co.,* N.D. Ala. 1963, 216 F. Supp. 473, *aff'd,* 5 Cir. 1964, 329 F.2d 313. *See also* 28 U.S.C.A. § 1332(c).

We have discerned nothing in the remainder of the record to cure these defects. *See, e.g., DeVries v. Starr,* 10 Cir. 1968, 393 F.2d 9, 11. Consequently, the admiralty jurisdictional underpinning having been removed, and no diversity jurisdiction appearing, this Court cannot now consider Delome's substantive negligence claim.

The judgment of the District Court is vacated for lack of jurisdiction and the cause is remanded with directions that it be dismissed without prejudice.

VACATED and REMANDED with Directions.

ON PETITION FOR REHEARING
AND
PETITION FOR REHEARING EN BANC

PER CURIAM:

The Petition for Rehearing is denied and no member of this panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc, (Rule 35 Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 12) the Petition for Rehearing En Banc is denied.

Supreme Court, U.S.
FILED
OCT 29 1971
E. ROBERT SEAVER, CLERK

NO. 71-454

IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

C. J. PAUL DELOME, *Petitioner*

v.

UNION BARGE LINE COMPANY, *Respondent*

v.

PLATZER SHIPYARD, INC., *Respondent*

On Petition For A Writ of Certiorari To The United States Court of Appeals For The Fifth Circuit

BRIEF FOR RESPONDENTS IN OPPOSITION

RIENSTRA, RIENSTRA & DOWELL
707 Beaumont Savings Bldg.
Beaumont, Texas, 77701
Of Counsel

JOHN D. RIENSTRA, JR.
707 Beaumont Savings Bldg.
Beaumont, Texas, 77701
Attorney for Respondent, Union Barge Line Company

Alpha Law Brief Co., M & M Bldg., Houston, Texas 77002

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OPINION BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit (Appendix 1 of Petition) is reported at 444 F.2d 225 (Fifth Circuit, 1971).

JURISDICTION

The jurisdictional requisites are adequately set forth in the petition.

QUESTIONS PRESENTED

1. Did Union Barge Line Company owe a duty of seaworthiness to Petitioner, C. J. Paul Delome?

A. Petitioner was not engaged in traditional duties of seaman.

B. The *UBL550* was not in navigation.

2. Did Petitioner, C. J. Paul Delome, have a maritime cause of action for negligence?

A. There was no admiralty jurisdiction since the injury occurred on land.

B. The Extension of Admiralty Jurisdiction Act does not apply under the facts of this case.

C. Since the *UBL550* was under the exclusive control of the third party ship repair company, Union Barge Line Company owed no duty to Petitioner under this Court's decision in *West v. The United States*, 361 U.S. 118 (1959).

STATUTE INVOLVED

46 U.S.C. 740; Extension of Admiralty Jurisdiction Act printed in Appendix A.

STATEMENT

Petitioner C. J. Paul Delome, a shipyard worker, was injured while working on a marine railway in Greens Bayou, Texas. Petitioner was an employee of Platzer Shipyards, Inc., who had contracted with Union Barge Line Company to repair the *UBL 550*, an open hopper cargo barge which had previously been damaged in the

bow section, thus necessitating the repairs. The barge was removed from the water and placed upon a marine railway where a section of the bow, measuring approximately 10 ft. by 12 ft., was cut away and replaced with a new pre-cut section.

Petitioner was a metal worker and shipfitter who was engaged in making the repairs. While thus engaged he was required to go on the barge where he tripped and fell, sustaining the injuries made the basis of his claim.

Petitioner sued under the General Maritime Law and recovered a judgment against Union Barge Line Company in the trial court which was subsequently vacated and remanded by the Court of Appeals for the Fifth Circuit.

The Court of Appeals held in substance that the trial court's finding that Delome was engaged in traditional work of seamen was clearly erroneous, thus he was not entitled to the warranty of seaworthiness. Further the Court held that the trial court had no admiralty jurisdiction over the cause of action for negligence since the vessel, at the time of the accident, was not situated on the navigable waters of the United States.

ARGUMENT

1. Did Union Barge Line Company owe a duty of seaworthiness to the Petitioner?

A. Petitioner was not engaged in traditional duties of seaman.

Petitioner's cause of action was predicated on the proposition that he was within that class of shoreside workers given maritime remedies under this Court's decisions in

Seas Shipping Co. v. Sieracki, 328 U.S. 85 (1946); *Pope & Talbot v. Hawn,* 346 U.S. 406 (1953) and their progeny.

This basis of the *Sieracki* doctrine was that a ship owner could not avoid his traditional responsibilities imposed by *Mahnich v. Southern S.S. Co.,* 321 U.S. 96 (1943) by parceling out the ship's work to others. Consequently this Court held that where a ship owner delegated the work to third parties, he did not thereby escape his responsibility to provide and maintain a seaworthy ship.

But it has become equally clear that a ship owner is not liable to all who may do work on the ship, for his duty extends only to those situations, the Jones Act aside, where he would be responsible had the work been performed by his own employees. The critical question in most cases is whether the injured workman was performing seamen's work, or as most generally articulated, traditional work of seamen. Was it customary for the ship's crew to do the type of work in which the injured third party was engaged, or was this the type of task that had always been done by others?

In answering this question, the Court has formulated many guidelines. In *West v. United States,* 361 U.S. 118 (1959) this Court focused its inquiry on the status of the vessel, the pattern of repairs and the exclusive nature of the work contracted to be done. And *West* made clear one point of extreme importance here. The status of the ship—that is, whether it is or is not in navigation—is an independent element of the ship owner's duty apart from whether a duty is owed to the one actually injured. For as this Court said in *West,* if the vessel is not in naviga-

tion, there can be no warranty of seaworthiness *to any person.*

Consequently, for our purposes here, Petitioner has two hurdles to overcome. First, he must show that the vessel upon which he was injured was in navigation and thus warranted its seaworthiness, not only to him, but to anyone. Second, he must show that he has the required status and is one to whom the warranty is owed.

This second element was found to be lacking by the Court of Appeals and presents merely a question of evidence of no particular national import.

The record in this case clearly reflects that Petitioner was in no way exposed to any of the hazards encountered by seamen. The *UBL 550* was damaged to the extent that the repairs could only be made with the barge removed from the navigable water. (App. 643). The water tight integrity of the hull was invaded, and although the repairs were minor as far as the total cost was concerned, they were clearly more than simple preventive maintenance.

The Court of Appeal's focus on the equipment used in repairing the vessel is perfectly logical. This equipment was not employed as a technological convenience but was absolutely necessary if the barge was to be repaired at all. Obviously, the employment of sandblasting equipment to replace the traditional method of hand chipping is a mere technological advance in method by which the same work is done; consequently the status of the workman is not necessarily changed by the fact that he is using modern labor-saving devices. But here, welding torches, a winch truck and crane were essential to perform the

contract of repairs—repairs that "could have been accomplished only on a dry docked vessel with special equipment, and by a trained crew of shipfitters, not seamen." 444 F.2d at _____.

As to Petitioner's contentions with respect to the testimony of the expert witness, it is noted that all the expert actually established was that it was traditional for seamen to perform repairs on their vessels, a point that is hardly disputed. But this furnishes no support for the District Court's conclusion with respect to the status of the Petitioner. For as this Court said in *United N. Y. and N. J. Sandy Hook Pilots Association v. Halecki*, 358 U.S. 613 (1959):

> "It avails nothing to say that the decedent was an 'electrician' and that many modern ships carry electricians in their crew.
>
> Pope & Talbot, Inc. v. Hawn, explicitly teaches that such labels in this domain are meaningless. It is scarcely more helpful to indulge in the euphemism that the decedent was 'cleaning' part of the ship, and to say that it is a traditional duty of seamen to keep their ship clean. The basic fact is * * * that the decedent 'was not doing what any crew member had ever done on this ship or anywhere else in the world so far as we are informed.' "

Such is the case at bar. The District Court's conclusion can not be supported by indulging in the "euphemism" that Petitioner was repairing part of the ship and that it is a traditional duty of seamen to repair ships. The inescapable fact is that here, as in *Halecki*, Petitioner "was not doing what any crew member had ever done." See *Drake v. E. I. DuPont De Nemours & Company*, 432 F.2d 276 (5th

Cir., 1970); *McCowen v. Humble Oil & Refining Company,* 405 F.2d 596 (4th Cir., 1969); *Atkins v. Greenville Shipbuliding Corporation,* 411 F.2d 279 (5th Cir., 1969).

B. The *UBL550* was not in navigation.

As above noted, a ship owner's duty to furnish a seaworthy vessel exists only with respect to those vessels that are in navigation. *West v. U. S.,* 361 U.S. 118 (1959); *Roper v. U. S.,* 368 U.S. 20 (1961). *Compare Watz v. Zapata Offshore Company, Et Al,* 431 F.2d 100 (5th Cir., 1970). As this Court said in *West,* the inquiry is focused upon the status of the ship, the pattern of repair and the extensive nature of the work contracted to be done.

As to the status of the ship, it is undisputed that the barge was on a marine railway and under the sole and exclusive control of the shipyard. It had no crew aboard, nor did any employee or representative of Respondent have anything to do with the carrying out of the repairs.

As to the pattern of repairs, it is likewise undisputed that while the total cost was small, it was, nevertheless, necessary to remove the vessel from the water and to physically remove a large section of the bow below the water line.

As was the case in *West,* the *UBL 550* was, as anyone could see, not in maritime service. Petitioner took his orders from the contractor, not the ship owner, and the barge was at the shipyard for the sole purpose of making her seaworthy so that she could return to trade and commerce. The barge clearly had been withdrawn from navigation.

2. Did Petitioner have a maritime cause of action for negligence?

A. There was no admiralty jurisdiction since the injury occurred on land.

B. The Extension of Admiralty Jurisdiction Act does not apply under the facts of this case.

This Court has held in case after case that maritime jurisdiction is limited to the water's edge, absent specific Congressional legislation or situations involving maritime contract. *The Plymouth,* 3 Wall. 20 (1866); *Grant Smith-Porter Ship Company v. Rohde,* 257 U.S. 469 (1922). *Compare Rodrique v. Aetna Casualty & Surety Company,* 395 U.S. 352 (1969).

The Court of Appeals accepted the proposition that maritime tort jurisdiction is governed by the locality of the tort and held that the District Court had no jurisdiction over the negligence claim. The Court of Appeals did not view the unseaworthiness count as a maritime tort and accordingly held that such liability is not governed by locality but by status. Respondent continues to urge that locality is determinative of jurisdiction with respect to both negligence and unseaworthiness but for the purpose of this reply will assume, without conceding, that the analysis of the Court of Appeals is correct.

In any event, there is no dispute about the fact that the *UBL 550* was situated entirely upon the land at the time of the Petitioner's injury, and as this Court observed in *Rodrique v. Aetna Casualty & Surety Company,* supra:

> "Admiralty jurisdiction has not been construed to extend to accidents on piers, jetties, bridges, or even

ramps or railways running into the sea." 395 U.S. at 360.

To extend jurisdiction under the General Admiralty Law to this case would clearly produce the anomalous results that this Court has studiously attempted to avoid in *Seas Shipping Company v. Sieracki,* supra; *Reed v. Yaka,* 373 U.S. 410 (1963); *Jackson v. Lykes Brothers SS Company,* 386 U.S. 731 (1967) and *Moragne v. States Marine Lines, Inc.,* 398 U.S. 375 (1970), for it is clear that had a co-worker of the Petitioner been injured under the exact circumstances as Petitioner, but while working aboard a new and uncompleted vessel, such co-worker would have no recourse under the General Maritime Law. *Grant Smith-Porter Ship Company v. Rohde,* supra, *Desper v. Starved Rock Ferry Company,* 342 U.S. 187 (1952); *Hastings v. Mann,* 340 F.2d 910 (4th Cir. 1965). In such case, both are exposed to the same hazards, and both are engaged in essentially the same type of work. It would be manifestly unfair to give them different legal treatment.

With respect to the EXTENSION OF ADMIRALTY JURISDICTION ACT, 46 U.S.C. 740, it is clear that that Act applies only where the injury is caused by a vessel on navigable water, which this injury certainly was not. Not only was the vessel physically removed from the navigable water, but all of the defects found by the District Court involved the design of the vessel, which certainly did not occur on navigable water. If the District Court was correct in concluding that these designed features, such as the width of the walkway and the height of the combing, rendered the vessel unsafe, then it is obvious that these defects existed even prior to the com-

missioning and launching of the vessel in 1955, and were not related to the operation of the vessel or to the stowage of cargo thereof. *Compare Gutierrez v. Waterman SS Corporation,* 373 U.S. 206 (1963).

Moreover, the legislative history of the statute indicates that the primary purpose was to create a maritime cause of action in those situations involving collisions between vessels and shore structures. 1948 U. S. Code Cong. Service, 1898, and while *Gutierrez v. Waterman SS Corporation,* supra, has applied the act to maritime personal injuries, the Court has remained faithful to its purpose by requiring that the tort be referable to the vessel and its operations while on the navigable waters of the United States. Petitioner is simply asking the Court here to fashion a maritime remedy for anyone who is injured while performing any task that is in any way, however remote, related to the maritime industry. By seeking to avoid any requirement that the tort be committed by a vessel on navigable water, Petitioner would have this Court extend remedies which were after all designed to meet the peculiar hazards of maritime service to anyone at any time and in any place whether he is realistically subject to these hazards or not.

C. Since the *UBL550* was under the exclusive control of the third party ship repair company, Respondent owed no duty to Petitioner under this Court's decision in *West v. The United States,* 361 U.S. 118 (1959).

Regardless of the correctness of the jurisdictional holding by the Court of Appeals, the judgment of that Court is correct, for the reason that Respondent owed no duty

to Petitioner under this Court's decision in *West v. U. S.*, 361 U.S. 118 (1949). In that case the Court observed that a ship owner generally has a duty to exercise reasonable care to furnish a safe place to work. But the Court noted that this duty is not owed under circumstances where the ship owner has no control over the vessel or power either to supervise or to control the repair work in which the injured plaintiff is engaged. The Court observed:

> "The respondent (ship owner), having hired Atlantic (repair company) to perform the overhaul and reconditioning of the vessel * * * is under no duty to protect petitioner from risks that were inherent in the carrying out of the contract." 361 U.S. at 123.

The Court went on to observe that there might be situations of hidden dangers that would make the ship owner guilty of negligence even though he had no control over the repairs but that where the vessel was under the sole and exclusive control of the shipyard and where the injury resulted from a risk encountered in carrying out the contract of repairs, there could be no liability.

The evidence in this record is overwhelming, and in fact the trial court found that Delome was injured because while doing his work he encountered risks on the barge where he was ordered to go. There was no hidden danger, nor did Petitioner encounter a hazard unrelated to the repair contract. Although the dangers found by the District Court were not in themselves a subject of the repair contract, that fact is irrelevant because it is undisputed that the only reason for Delome's presence on the barge was by virtue of his performance of the contract of repairs.

The shipyard had the sole and exclusive control of the barge and knew of the hazards to be encountered; consequently as the Court said in *West*:

> "Any culpability here could be chargeable only to the contractor, not to the ship owner." 361 U.S. at 124.

CONCLUSION

For the above and foregoing reasons, it is respectfully submitted that this Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

707 Beaumont Savings Bldg.
Beaumont, Texas, 77701
Attorney for Respondent,
Union Barge Line Company

PROOF OF SERVICE

I, John D. Rienstra, Jr., attorney for Respondent Union Barge Line Company, and a member of the Bar of the Supreme Court of the United States, hereby certify that I have served copies of the foregoing Brief in Opposition to the Granting of a Petition for Writ of Certiorari upon Mr. Ned Johnson, 320 College Street, Beaumont, Texas, Attorney for Petitioner, and Mr. Dewey J. Gonsoulin, 1400 San Jacinto Building, Beaumont, Texas, Atto. ey for Respondent, Platzer Shipyard, Inc., by mailing three copies thereof, postage prepaid and properly addressed, on this 27 day of October, 1971.

APPENDIX A

The admiralty and maritime jurisdiction of the United States shall extend to and include all cases of damage or injury to person or property caused by a vessel on navigable water notwithstanding that such damage or injury be done or consummated on land.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-454

C. J. PAUL DELOME,

Petitioner,

against

UNION BARGE LINE COMPANY, et al.,

Respondent,

against

PLATZER SHIPYARD, INC.,

Respondent.

APPLICATION FOR LEAVE TO FILE *AMICUS CURIAE* BRIEF, *AMICUS CURIAE* PETITION AND BRIEF IN FAVOR OF PETITIONER

AMERICAN TRIAL LAWYERS ASSOCIATION

Admiralty Section
By: Paul S. Edelman

PAUL S. EDELMAN,
99 Park Avenue,
New York, New York,
On Petition & Brief.
212—MU 7-8181

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-454

C. J. PAUL DELOME,

Petitioner,

against

UNION BARGE LINE COMPANY, et al.,

Respondent,

against

PLATZER SHIPYARD, INC.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MOTION OF THE AMERICAN TRIAL LAWYERS ASSOCIATION FOR LEAVE TO INTERVENE AS *AMICUS CURIAE* IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI

The American Trial Lawyers Association moves this Honorable Court for leave to file the attached brief as *Amicus Curiae* in support of the petition for a writ of certiorari in this case.

Consent has been sought from the parties here. Consent to file an *amicus curiae* brief has been given by counsel for the Petitioner, but counsel for Respondents have refused

consent. Accordingly, this motion is brought pursuant to Rule 42.

Members of the Admiralty Section of the Association include attorneys who represent the major number of injured longshoremen, maritime workers and crew members. In particular, these attorneys are directly concerned with the scope and effect of the admiralty jurisdiction, and the legal effects of accidents in drydocks and marine railways.

Since this case represents but one of many situations where a basic question of jurisdiction has been put in question, the Association feels constrained to petition this Court for leave to intervene as *amicus curiae*.

Respectfully submitted,

PAUL S. EDELMAN,
Counsel for the American
Trial Lawyers Association,
Admiralty Section.

In The

Supreme Court of the United States

OCTOBER TERM, 1971

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C. J. Paul Delome,

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against

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Respondent.

AMICUS CURIAE PETITION AND BRIEF IN FAVOR OF PETITIONER

American Trial Lawyers Association
Admiralty Section

Statement of Interest of the *Amicus Curiae*

The American Trial Lawyers Association, is a national bar association, consisting of more than 20,000 lawyers, primarily engaged in the practice of personal injury law. The Admiralty Section of this Association consists of a substantial number of attorneys and proctors who specialize in maritime personal injury law. These attorneys

represent members of the merchant marine and other maritime workers who are engaged in a hazardous industry and are recognized as having a special status both by legislation and generally in the courts of the land. All of these maritime workers have a real and direct interest in the outcome of the appeal.

Said Association is vitally concerned in the final outcome of this case involving as it does a situation which may finally resolve the tortuous series of cases which have attempted for over a generation to make a clear line by which attorneys and injured maritime workers will know their rights. It is a question of serious importance since 25% of all longshoremen's injuries occur on docks and piers. Only a broad interpretation of Maritime Jurisdiction will protect these men as Congress intended.

A resolution of the issues in this case will materially affect not only the financial plight of injured maritime workers, but is of paramount importance to thousands of workers, to the admiralty bar, and to the maritime industry generally. For the foregoing reasons it is respectfully prayed that this Honorable Court accept this brief *Amicus Curiae*.

PAUL S. EDELMAN,
of KREINDLER & KREINDLER,
99 Park Avenue,
New York, New York 10016,
Former Chairman, Admiralty Sect.,
American Trial Lawyers Association.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-454

C. J. PAUL DELOME,

Petitioner,

against

UNION BARGE LINE COMPANY, *et al.*,

Respondent,

against

PLATZER SHIPYARD, INC.,

Respondent.

BRIEF OF THE AMERICAN TRIAL LAWYERS ASSOCIATION IN SUPPORT OF PETITIONER

Questions Presented

1. Does the warranty of seaworthiness apply to a vessel undergoing minor repairs on a marine railway drydock. Does the warranty apply to a ship repairman performing "traditional duties of a seaman", but using modern equipment to effect the repairs.

2. Did the Court of Appeals exceed its powers in reversing the trial judge's findings that the injured man was performing the "traditional duties of a seaman".

3. Did the Court of Appeals err in holding that there was no admiralty jurisdiction for a negligent maritime

tort preceding the movement of a vessel on to a marine railway for repairs, although the injury occurred as a proximate result of the negligence when the vessel was on the marine railway.

Statement of the Case

Rather than repeat an extensive Statement, Amicus American Trial Lawyers Association will adopt petitioner's statement as it appears in his Petition for a Writ of Certiorari and in The Fndings of Fact of District Judge William Wayne Justice.

Suffice it to say, and for the most part, as recited in the opinion of Circuit Judge Dyer below, plaintiff was injured on a barge while it was on a marine railway. The walkways were 20 inches wide, the coamings 3 5/16 inches high and next to an open cargo hatch. On the port side there were brackets, bitts and a circular pumpwell cover at the walkway.

The minor repairs amounted to $3,688.76, lasting three days insofar as the vessel was on the marine railway.

Findings Included

1. There was no safe place to work for plaintiff because of construction defects existing when the vessel was brought to the repair facilities.

2. Plaintiff had nothing to hold on to at the open hatch area.

3. The passageway was not reasonably fit for its intended service.

The conclusions of law based on the facts as found were:

1. The walkway was unseaworthy and contributed to the injuries.

2. The hatch coaming was unseaworthy and contributed to the injuries.

3. The unseaworthy conditions pre-existed delivery to the repair yard.

4. The vessel was in navigation; plaintiff was performing the traditional duties of a seaman in making minor repairs.

5. The shipowner was negligent.

This Court is being called upon to re-assert admiralty jurisdiction over vessels including vessels on marine railways; to reassert the salutary protection of the unseaworthiness warranty to those doing the work of seamen of old in making minor repairs on a vessel; to reassert the doctrine that the use of modern methods and equipment does not relieve a vessel owner of its obligation to provide a seaworthy vessel and appurtences; and to reassert that the negligence of a shipowner while it has control is actionable although it causes an accident after it relinquishes "control" and that this negligence is a "maritime tort," giving admiralty jurisdiction.

To withdraw the protection of maritime law from a repairman undertaking minor repairs of a vessel is to deny a seaman a vital protection from the known heavy risks of maritime employment.

I. The Warranty of Seaworthiness Applies

A. A Vessel Undergoing Minor Repairs on a Marine Railway Is Within the Reach of the Warranty of Seaworthiness

It seems clearly established that a repairman making minor repairs to a ship at dockside undergoing an overhaul is protected by the warranty of seaworthiness.

Lawlor v. *Socony-Vacuum Oil Co., Inc.*, 275 F. 2d 599 (2nd Cir. 1960).

Navigable waters have traditionally been equated with dry docks, and dry docks have traditionally included marine railways which perform the same essential function.

The Court below accepted the fact that the barge here was in navigation undergoing minor repairs.

The Longshoremen's and Harbor Workers' Compensation Act of 1927, 44 Stat. 1424, 33 U.S.C., Sec. 901-950 in Section 903 provides coverage for "disability or death . . . from any injury occurring upon the navigable waters of the United States (including any dry dock) . . ."

In discussing the final wording of this Section 3 (i.e., Sec. 903 above), this Court in *Nacirema Operating Co., Inc.* v. *Johnson* (1969), 396 U.S. 212, at footnote 10 states:

"Drydocks were conceded to be within the admiralty jurisdiction in both the hearings and the debates, even though such structures are not always floating structures. See House Hearings, at 34; 68 Cong. Rec. 5403 (1927)."

The "drydock" jurisdictional requirement of the Act has been interpreted with the broadest liberality. Reason, as well as consistency dictate that "upon navigable waters" be sensibly interpreted as meaning just that particularly as here, to a ship. As Judge Hannaby said in *Port Houston Ironworks, Inc.* v. *Calbeck*, 227 F. Supp. 966 (S.D. Tex., 1964) in explaining his refusal to adopt the interpretation urged by the employer:

"The most recent authorities suggest a contrary conclusion. (Citations omitted.) The thrust of those cases is to obliterate nice distinctions constrictive of admiralty jurisdiction" (967).

The "drydock" decisions are plentiful. We wish, to call attention to *Holland* v. *Harrison Bros. Drydock and Ship*

Repair Yard, Inc., 306 F. 2d 269 (5th Cir., 1962), and these excerpts from the opinion of Judge Wisdom:

"Harrison Brothers counters that when a worker is injured with both feet planted on dry earth, there is no federal coverage regardless of whether he may be standing at the water's edge or near a dry dock" (370).

"It seems reasonable to us that any meaningful definition of marine railway should include the land immediately adjacent to the tracks 'that is beneath a ship drawn up on the railway and that must be used in the course of repairing any ship on the railway'. This argument draws strength from the fact that the general assignment Holland was performing was of a basically maritime nature" (372).

"In determining whether a worker's personal injury claim falls within the federal admiralty jurisdiction or the jurisdiction of the state, courts have regularly looked to both the locality of the accident and the nature of the work being performed. The literal language of the Longshoremen's Act seems to concern only the locality of the accident, but the history of the Act indicates that its underlying purpose was to embrace the admiralty jurisdiction whatever that might be." (Citations omitted.) (fn. 4, 372).

In *Avondale Marine Ways, Inc.* v. *Henderson,* (1953) 346 U.S. 366, the Supreme Court affirmed, per curiam, an award for fatal injuries sustained on a barge on a marine railway, 400 feet from the water. Courts have been particularly responsive to affording coverage under the Act to so-called "dry land" injuries. Cf. *Travelers Ins. Co.* v. *Branham,* 136 F. 2d 873 (4th Cir., 1943); *Travelers Ins. Co.* v. *McManigal,* 139 F. 2d 949 (4th Cir., 1944) and *Newport News S.B. & D.D. Co.* v. *O'Hearne,* 192 F. 2d 969 (4th Cir., 1951).

The equation of navigable waters with a drydock was also made in *Calbeck* v. *Travelers Ins. Co.* (1962) 370 U.S.

114 at 129 in discussing the *Avondale* Case. The Court there stated:

"Since a marine railway was considered to be a 'dry dock' the injury satisfied Sec. 3 (a)'s requirement that it occur 'upon, . . . navigable waters, defined in Sec. 3 as 'including any dock.' "

Furthermore, the equation of drydock and marine railway injuries with injuries aboard ship in water are consistent with the fact that vessel repair contracts are considered maritime claims, allowing a maritime lien.

New Bedford Dry Dock Co. v. *Purdy* (1922) 258 U.S. 96.

The Maritime Lien Act, 46 U.S.C., Sec. 971 et seq. (as amended, 1920) sets forth in part:

"Any person furnishing repairs, supplies, towage, use of dry dock or marine railway or other necessaries, to any vessel" . . . (when authorized) . . . "shall have a maritime lien on the vessel, which may be enforced by suit in rem . . ."

This Act specifically supersedes all state in rem statutes. 46 U.S.C., Sec. 975.

B. The Warranty Applies to Those Performing "Traditional Duties of a Seaman"

The repairs in question were minor in expense time, and scope. Since the trial judge so found, and accepted an expert witnesses' testimony that the repair was essentially similar to those made by seamen of old, the warranty should be upheld here.

Petitioner's brief recites the testimony elicited, and the facts clearly come within the doctrine of *Seas Shipping Co.* v. *Sieracki* (1946) 328 U.S. 85.

Lawlor v. *Socony-Vacuum Oil Co., Inc.*, 275 F. 2d 599 (2nd Cir. 1960).

Jackson v. *Lykes Bros. Steamship Co., Inc.* (1967) 386 U.S. 731.

C. The Use of Modern Equipment Does Not Foreclose Application of the Warranty

Sieracki also places great emphasis upon the fact that the warranty applies even where a shipowner has secured "the advantages of specialization of labor and skill brought about by modern divisions of labor."

The fact that heavy shoreside gear is used for ship repair, loading and unloading today cannot change the rule of law which arose from hazards of sailing ships long ago with their more limited mechanisms. Danger from new types of cranes, scoops and the like is just as menacing as traditional ship's gear.

In *Huff* v. *Matson Navigation Co.*, 338 F. 2d 205 (9th Cir. 1964), a longshoreman was hurt in the hold of a vessel by a scraper which was part of a stevedoring company's dockside crane used to unload bulk sugar. The Court held that this type of equipment, although new and novel could give rise to a claim for unseaworthiness in a well reasoned opinion.

Accord, Spann v. *Lauritzen*, 344 F. 2d 204 (3rd Cir. 1965).

II. The Court of Appeals Exceeded Its Powers in Reversing the District Court's Finding That the Petitioner Was Performing the "Traditional Duties of a Seaman"

The findings of the district judge that there were minor repairs was well reasoned and supported. He also found

that Petitioner was performing "traditional duties of a seaman" in undertaking a minor repair.

Findings are presumptively correct and are not set aside unless clearly erroneous.

"A finding is clearly erroneous when 'although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed.'"

McAllister v. *U.S.* (1954), 348 U.S. 19.

It is for the trial judge to draw different inferences or decide conflicting evidence.

Loc-Wood Boat and Motors, Inc. v. *Rockwell,* 245 F. 2d 306, 310 (8th Cir. 1957).

This is especially so with live witnesses.

See:

Spanos v. *The Lily,* 261 F. 2d 214, 215 (4th Cir. 1958).

The Court below would be inconsistent in not upholding the judge's ultimate findings, when the Court of Appeals itself stated that:

> "... it is clear that the UBL550 was a vessel in navigation undergoing minor repairs at the time of Delome's injury" (p. 15).

Many cases were cited below to show that the navigational status of a vessel ordinarily remains a question of fact, and that a ship entering a shipyard for minor repairs still is in navigation for purposes of applying the seaworthiness warranty.

III. Negligence of a Ship or Shipowner Causing Injury Is a Maritime Tort and Within the Admiralty Jurisdiction

Negligence as a maritime tort was recognized early as between a shipowner and non-employees.

In *Leathers* v. *Blessing* (1882), 105 U.S. 626 a business invitee was injured by a negligently stowed bale of cotton, and suit was upheld.

Over time the maritime rules of comparative negligence were applied to these invitee-negligence cases over the more limiting common law concepts.

The Max Morris (1890) 137 U.S. 1. (Longshoreman fell through unguarded opening in rail).

The development of negligence concepts as well as the application of unseaworthiness concepts for seamen is recorded at length in the *Sieracki* case.

As an ultimate statement of the maritime rule of negligence as a maritime tort, we have *Kermarec* v. *Compagnie Generale Transatlantique* (1959), 358 U.S. 625, which stated the rule that the shipowner owes a duty of due care to all those aboard ship "for the purposes not inimical to his legitimate interests . . ."

One of the most far-reaching cases involving a dry dock is *Ira S. Bushey & Sons, Inc.* v. *U.S.*, 398 F. 2d 167, 169 (2nd Cir. 1968).

There, a Coast Guard vessel was being overhauled in a dry dock, and an intoxicated Coast Guardsman opened valves that flooded tanks on one side of the dry dock causing the ship to fall off blocks and damage the dry dock wall. The Second Circuit Court of Appeals had no difficulty finding two admiralty statutes applicable, namely the Public Vessels Act and the Suits in Admiralty Act as revised in

1960. Under the 1960 revision, the latter act made the United States liable for damage arising from its vessels in the same manner as though the vessels "were privately owned or possessed, * * *" 46 U.S.C., Sec. 742. The Court stated that all maritime claims against U.S. vessels were thereby within the admiralty jurisdiction of federal courts, but the underlying assumption was that this would also be the case for all non-governmental vessels in a dry dock as well. Reference was made to S. Rep. 1894, 86th Cong. 2nd Sess., 2 U.S. Code Cong. and Adm. News, P. 3583 *et seq.*

If admiralty jurisdiction arises for the negligence of a crew member of a vessel in dry dock, surely the jurisdiction lies for negligence in construction and maintenance of the vessel itself, and its appurtenances.

Under *Albanese* v. *N.V. Nederl. Amerik. Stoomv. Maats* (1965), 382 U.S. 283, a shipowner could be held liable for constructive knowledge of noxious fumes in the hold.

If the shipowner is clearly liable for negligence as a general proposition, he is liable for his negligence in allowing a continuing dangerous condition to exist beginning prior to his placing the ship in the hands of a repair yard.

Van Horn v. *Gulf Atlantic Towing Corp.*, 388 F. 2d 636 (4th Cir. 1968).

(a barge owner would be liable for injury to a shipyard employee injured by grain residue left on deck when the vessel was delivered to the dry dock, on a negligence theory).

In *White* v. *U.S.*, 400 F. 2d 74 (4th Cir. 1968), a repair worker could recover in negligence if oil on his clothes came from an unsafe oily condition created while the owner was still in control.

These latter two cases are restrictive and unsound on their development concerning the unseaworthiness rule,

but they are clearly right in expressing the negligence rule.

As developed in Point 1, a marine railway is traditionally within the maritime and admiralty jurisdiction; the same rules as to navigable waters apply to marine railways and dry docks.

If the impact of a shipowner's negligence occurs on a marine railway, this is a "maritime tort", within the admiralty jurisdiction.

This is demonstrated by:

1. The history of the Longshoremen's Act, Sec. 903 set forth in the *Nacirema* case.

2. The long line of dry-dock and marine railway cases allowing application of the Longshoremen's Act, and confirmed by *Calbeck*.

3. The traditional rule and the Maritime Lien Act allowing a maritime lien for ship repairs.

Therefore, any colorable claim of negligence within the maritime jurisdiction of the Court allows a suit in admiralty, particularly since the ship itself is liable for its torts, in rem.

In *Romero* v. *International Terminal Operating Co.* (1959), 358 U.S. 354, the fundamentals of the federal admiralty jurisdiction are discussed.

Our Constitution made three grants of maritime jurisdiction.

1. Congress was authorized to confer admiralty jurisdiction in federal courts inferior to the Supreme Court.

2. The federal courts were to draw on the "inherent" substantive law of the admiralty and maritime

jurisdiction, and to continue its development within Constitutional limits, and

3. Congress was empowered to "revise and supplement" maritime law.

Romero also held, germane here, that a "substantial claim" that a foreign crew member came within the Jones Act, would confer Civil jurisdiction to a federal court, and that other non-statutory claims against other parties gave "pendent" Civil jurisdiction.

By clear analogy, a colorable claim of negligence and maritime tort would confer admiralty jurisdiction.

Admiralty jurisdiction clearly does not require an injury on navigable water in the strictest sense.

As stated in a leading Jones Act case where the injury was suffered on land, but in conjunction with a vessel:

". . . the admiralty jurisdiction over the suit depends not on the place where the injury is inflicted but on the nature of the service and its relationship to the operation of the vessel plying in navigable waters."

O'Donnell v. *Great Lakes Dredge & Dock Co.* (1943), 318 U.S. 36, 42-43 (and interstate commerce need not be invoked).

Where a *vessel* is involved, the vessel itself is an offender and gives rise to an admiralty claim.

"The proceeding *in rem* which is within the exclusive jurisdiction of admiralty is one essentially against the vessel itself as the debtor or offending thing,—in which the vessel is itself 'seized and impleaded as the defendant and is judged and sentenced accordingingly'. By virtue of dominion over the thing all persons interested in it are deemed parties to the suit; the decree binds all the world, and under it the property itself passes and not merely the title or interest of a personal defendant."

Rounds v. *Cloverport Foundry & Machine Co.* (1915), 237 U.S. 303, 306.

Can anyone doubt that a suit here against the vessel as the offender, *in rem*, would lie?

After all, what is more within the admiralty jurisdiction than a vessel whose fault is alleged, and especially a vessel in dry dock or on a marine railway, traditionally as maritime as navigable waters?

The Court below is wrong under *Romero* in restricting civil jurisdiction in this case. It is more in error in denying a jurisdiction in admiralty when a maritime tort for negligence is alleged.

Amicus therefore respectfully request this Honorable Court to grant certiorari on this case involving a large area of maritime concern and workmen. Furthermore, there are basic uncertainties when an appellate court can find a vessel undergoing minor repairs to be in navigation, and then deny admiralty jurisdiction for a pre-existing negligent condition, and to deny the applicability of the protective doctrine of unseaworthiness.

This Court in its Constitutional power to "revise and supplement" maritime law can determine both matters of doctrine and jurisdiction so as to give the protection to seamen that has historically been the guideline for judicial action.

Respectfully submitted,

PAUL S. EDELMAN,
Admiralty Section,
American Trial Lawyers Assn.

Certificate

This is to certify that on the 9th day of November, 1971, copies of the within brief *Amicus Curiae* were served by mail on Ned Johnson, 320 College, Beaumont, Texas, counsel to Petitioner; Wayne Patterson, 2300 Memorial Blvd., Pt. Arthur, Texas, 77640, counsel to petitioner; Rienstra, Rienstra & Dowell, 707 Beaumont Savings Building, Beaumont, Texas 77701, attorneys for respondent Union Barge Line Co.; and Mehaffy, Weber, Keith & Gonsoulin, 1400 San Jacinto Building, Beaumont, Texas 77701, attorneys for respondent-third-party defendant-Platzer Shipyard, Inc.

PAUL S. EDELMAN.